

**DIGEST**

OP

**FIRE INSURANCE DECISIONS**

IN

**THE COURTS OF THE UNITED STATES,  
GREAT BRITAIN AND CANADA.**

BEING A

SUPPLEMENT OR CONTINUATION OF THE THIRD AND LAST EDITION  
OF LITTLETON & BLATCHLEY, CLARKE, AND BATES' DIGEST.

FROM 1872 TO 1882.

BY **GEORGE A. CLEMENT,**

OF THE NEW YORK BAR.

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## P R E F A C E.

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THIS volume covers the period extending from 1872 to 1882, and is designed as a supplement or continuation of the third and last edition of the well known work of Littleton and Blatchley (edited by Mr. Bates), published in 1873. It contains an addition of about 1,200 cases. On account of the familiarity acquired in the use of the first volume, it has been deemed best to follow substantially the same plan and arrangement in this. Beginning where Mr. Bates ceased, I have personally taken each volume of the official reports of all the courts, published in the United States, Great Britain and Canada, to 1882, and faithfully endeavored to digest from each reported case on the subject everything of value to both the underwriter and lawyer. I have also included the cases contained in the various law and insurance journals to 1882, not taken from the regular or official reports.

From the number, importance, and character of the cases decided during the past ten years, one cannot fail to be impressed with the fact that the law of fire insurance has received new and material light and development. True, conflicting opinions and decisions exist, and doubtless will continue to be announced and published, tending to add to the confusion and uncertainty, but it must be remembered that such is always the case in the establishment of legal principles applicable to comparatively new subjects. If underwriters and their representatives would cease to be purely technical, and, instead of planting themselves upon their policies solely as contracts, would seek to develop and make plain the principles involved in their business, they would receive more frequently just consideration at the hands of both courts and juries. Judges most clearly and satisfactorily decide when they not only understand the policy of insurance as a naked contract, but are also made to comprehend the reason of the partic-

ular provision upon which reliance is placed—its practical course and operation, and evil effects, if not applied and enforced.

This book being designed for the underwriter as well as the lawyer, it may not be out of place to caution the former that a particular case is not authority out of the territorial limits of the State whose court pronounces the decision, and is available only as argument in other jurisdictions; and, also, that it is not safe to base an act, statement, or declaration upon any one particular case without first comparing all bearing on the subject. Courts quite frequently distinguish cases, and the more intelligently this is anticipated and determined by the underwriter or lawyer, the more satisfactory and successful the result.

No one could more fully realize actual and possible errors than myself, and it would be esteemed a favor to be advised of all such not indicated in the *errata*. My thanks are due to William E. Iliff, Esq., of the New York Bar, for aid in preparation of the Tables of Cases and Reports, and generally in putting the work through the press.

In the hope that the book will be of some assistance in ascertaining the true principles of the law of fire insurance, I have satisfaction for many hours of labor.

G. A. CLEMENT.

NEW YORK, FEBRUARY 22, 1882.

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Abb. Ct. App. Dec.	Abbott's Court of Appeals Decisions. N. Y.
Abb. N. C.	Abbott's New Cases. N. Y.
Aff'd.	Affirmed.
Aff'g.	Affirming.
Ala.	Alabama.
Alb. L. J.	Albany Law Journal.
Allen.	Allen, New Brunswick.
Barb.	Barbour, N
Baxt.	Baxter, Tennessee.
Biss.	Bissell, U. S. Circuit.
Blatch.	Blatchford, U. S. Circuit.
Cal.	California.
Can. Sup.	Canada Supreme.
Cin. Supr. Ct.	Cincinnati Superior Court.
Cliff.	Clifford, U. S. Circuit.
Cochran, N. S.	Cochran, Nova Scotia.
Col.	Colorado.
Conn.	Connecticut.
Coop. Ch.	Cooper, Chancery. Tennessee.
Dill.	Dillon, U. S. Circuit.
Disney Cin. Sup.	Disney, Cincinnati Superior.
Fed. Rep.	Federal Reporter.
Ga.	Georgia.
Grant, Cas.	Grant Cases. Canada.
Grant, Ch.	Grant, Chancery. Canada.
Grant, Err. & App.	Grant, Errors and Appeals. Canada.
Grat.	Grattan, Virginia.
Houst.	Houston, Delaware.
Id.	Same.
Ill.	Illinois.
Ind.	Indiana.
Ins. L. J.	Insurance Law Journal.
Irish Rep. C. L.	Irish Common Law Report.
Jones & Sp.	Jones & Spencer, N. Y.
Kans.	Kansas.
La. Ann.	Louisiana Annual.
Lans.	Lansing, N. Y.
Law Rep. Q. B. D.	Law Report, Queen's Bench Division.
L. C. Jurist.	Lower Canada Jurist.

## TABLE OF ABBREVIATIONS.

L. R. App. Cas.	Law Report, Appeal Cases, English.
L. R. Ch. Div.	Law Report, Chancery Division, English.
L. R. C. P. Div.	Law Report, Common Pleas Division, English.
L. R. C. P.	Law Report, Common Pleas, English.
L. R. Ired.	Law Report, Ireland.
L. R. Q. B. Div.	Law Report, Queen's Bench Division, English.
Mass.	Massachusetts.
Md.	Maryland.
Me.	Maine.
Mich.	Michigan.
Minn.	Minnesota.
Miss.	Mississippi.
Mo.	Missouri.
Mo. App.	Missouri Appeal.
Mont.	Montana.
N. C.	North Carolina.
Neb.	Nebraska.
Nev.	Nevada.
N. H.	New Hampshire.
N. Y.	New York.
N. Y. Weekly Dig.	New York Weekly Digest.
Oldright, N. S.	Oldright, Nova Scotia.
Pa.	Pennsylvania.
Phil. Rep.	Philadelphia Reports.
Pugsley & B.	Pugsley and Burridge, New Brunswick.
Quebec L. R.	Quebec Law Report.
Q. B.	Queen's Bench.
R. I.	Rhode Island.
Rep.	Reporter.
Rev'd.	Reversed.
Rev'g.	Reversing.
Russel & C. N. C.	Russell and Chesley, Nova Scotia.
s. c.	Same Case.
s. p.	Same Principle.
Stew. N. J. Eq. R.	Stewart, New Jersey Equity Reports.
T. & C.	Thompson and Cook, N. Y.
Tenn.	Tennessee.
Tex.	Texas.
Tr. App.	Transcript of Appeals, N. Y.
Up. Can. C. P.	Upper Canada, Common Pleas.
Up. Can. Q. B.	Upper Canada, Queen's Bench.
Vroom, N. J. L. R.	Vroom, New Jersey Law Report.
Vt.	Vermont.
Wall.	Wallace, U. S. Supreme.
Wis.	Wisconsin.
W. Va.	West Virginia.

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## ERRATA.

- Page 159, § 2, last word "constitution" should be "condition."  
Page 161, § 7, fourth line from last, the word "no" should be "an."  
Page 175, § 11, first line, the word "mortgage" should be "mortgagee."  
Page 187, § 26, second line from last, the word "in" should be "no."  
Page 280, § 14, first line, the word "priority" should be "privity."  
" " " second line, the word "re-insured" should be "re-insurer."  
" " " third line, first word "insured" should be "insurer."  
Page 285, § 10, last line, "584" should be "684."

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ADJUSTMENT.

§ 1. An adjustment claimed by the assured to have been procured by fraud of the company, may be rescinded only by paying back or tendering the amount received. *Potter v. Monmouth Ins. Co.* 63 Me. 440. 1873.

§ 2. A compromise agreement, like accord and satisfaction, in order to take away right of action on the original contract, must be an agreement which is substituted for the pre-existing obligation. It must bind both parties, so that suit may be maintained by either to enforce the same. *Luce v. Springfield Ins. Co.* 2 Ins. L. J. 443. 1873. U. S. Circuit, Mich.

§ 3. Policy insured \$1,500, being divided as follows: “\$500 on dwelling; \$600 on barn; \$400 on produce therein.” Defendant’s agent paid \$400 for a loss by destruction of the produce and took a receipt from the assured in which he declared that he accepted the \$400 as full satisfaction for the loss sustained on the policy, “canceling \$1,500 on said policy.” *Held*, that there was no technical release, and the payment of a sum for a distinct loss formed no consideration for the discharge from liability in respect to the insurance on the barn, and the want of consideration for the discharge of that liability was a good answer to the claim that it was covered by terms of the receipt. *Redfield v. Holland Purchase Ins. Co.* 56 N. Y. 354. 1874.

§ 4. When an adjustment is made in terms "subject to terms and conditions of the policies," the true construction is that it is subject to all the terms and conditions except such as are superseded by the fact that the loss and damage have been fixed. An adjustment with such an agreement means simply that the company will pay the loss as fixed under the terms and conditions of the policy, if under them the plaintiff is entitled to payment. Whipple v. N. B. & M. Fire Ins. Co. 11 R. I. 139. 1875.

§ 5. When a settlement is made with a member of a firm insured who is a minor, through fraud of company's agent, the firm, having received the money, can not maintain an action upon the policy without first returning the money. Brown v. Hartford Fire Ins. Co. 117 Mass. 479. 1875.

§ 6. An adjustment and agreement upon the amount of loss does not prevent the company from showing in a suit upon the policy that the conditions of the latter had been previously violated so as to discharge it from liability. Colonius v. Hibernia Fire Ins. Co. 3 Mo. App. 56. 1876.

§ 7. An adjustment is not evidence of value between any others than the parties to it. Bardwell v. Conway Ins. Co. 122 Mass. 90. 1877.

§ 8. An agent having special authority to adjust a particular loss, cannot, by virtue thereof, adjust a different one, and whatever he may assert in reference to a different one does not affect the company. Hartford Fire Ins. Co. v. Smith, 3 Col. 422. 1877.

§ 9. An action upon an adjustment itself does not lie. It is necessary to aver and prove that the company promised to *pay* the insured the *amount* of the adjustment. Such a promise is the gravamen of the action. Quarrier v. Peabody Ins. Co. 10 W. Va. 507. 1877.

§ 10. When adjuster, after agreeing with the assured upon the amount of the loss, states that he will take the

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papers to the company at another place, and that the assured would hear about a discount in a few days, or that he would get his money in sixty days, and assured never hears from him or the company, it may be inferred that the action of the adjuster is made known to the company on his return, and from the evidence there is a right to infer that an actual adjustment was made and a recovery under a count alleging adjustment would be sustained on such proof. *Stolle v. Aetna Ins. Co.* 10 W. Va. 546. 1877.

§ 11. An adjustment procured by fraud is not binding. *American Ins. Co. v. Crawford*, 89 Ill. 62. 1878.

§ 12. Assured was induced by representations of an adjuster of the invalidity of claim under his policy, to settle for one hundred dollars, and to execute a release. He afterwards repudiated the settlement, and brought suit upon the policy, claiming that the release was procured by fraud and deceit of company's agent. Trial court submitted adjuster's representation of illegality of claim as an element of fraud upon which assured had a right to rely. *Held*, error; that the representation of the adjuster constituted an expression of opinion only as to legal rights, and, though erroneous, should not have been submitted to jury as an element of fraud. *Aetna Ins. Co. v. Reed*, 8 Ins. L. J. 350. 1878. Sup. Court Commission, Ohio.

§ 13. A loss adjusted and paid becomes an accord with satisfaction, and when no fraud is claimed, is a bar to another action on the same claim. *Untersinger v. Niagara Ins. Co.* 10 Ins. L. J. 237. 1881. Ohio Dist. Court.

See Agent, § 8, 34, 37, 44, 70. Contribution, 19. Damages, 18. Estoppel, 6, 19, 32. Evidence, 3, 19, 33, 34, 53, 67. Examination under Oath, 4. Mortgagor and Mortgagee, 36. Mutual Company, 53, 94, 184. Notice of Loss, 15. Other Insurance, 42. Payment of Loss, 3. Proofs of Loss, 2, 5, 6, 54, 56. Recovery Back of Losses, 2. Waiver, 22, 27, 32, 33, 46. Warranty and Representation, 27.

## AGENT.

§ 1. Company cannot be enjoined from collection of its premiums in suit brought by a dismissed agent. *Machette v. Hodges*, 1 Brewster, 313. 1867.

§ 2. Soliciting agent or broker may be the agent of the company, and clause in policy making him agent of assured cannot operate to change his character. *Commercial Ins. Co. v. Ives*, 56 Ill. 402. 1870.

§ 3. The custom of agents ratified by the company sufficiently establishes their authority. *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354. 1870.

§ 4. A commission to two agents jointly expires with the death of one. The survivor cannot bind the company without proof of subsequent recognition or authority. *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180. 1870.

§ 5. Authority of agent is not limited by written instructions and authority. *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180. 1870.

§ 6. When the question is as to whether a certain machine is included in the term "machinery" as used in the policy, it is not error to charge the jury, that "if defendant's agent wrote the application, and did so in such form as to include the machine, and such was the intention of the parties, defendant is liable for its loss." *James River Ins. Co. v. Merritt*, 47 Ala. 387. 1872.

§ 7. Assured may ratify action of another in obtaining a policy even after a loss. *Excelsior Fire Ins. Co. v. Royal Ins. Co.* 7 Lans. 138. 1872. Aff'd, 55 N. Y. 343.

§ 8. The fact that a local agent has to some extent taken an active part in business of ascertaining and adjusting losses, does not prove a general authority to act in such matters. Such an authority is special in its nature,

and must be established. The adoption of an arbitrator previously selected by other parties is not within the apparent scope of his agency. *Turner v. Quincy Ins. Co.* 109 Mass. 568. 1872.

§ 9. The delivery of a policy to a broker for purpose of delivery to the assured, constitutes the former agent of the company in receiving the premium. *Cahill v. Andes Ins. Co.* 5 Biss. 211. 1872. s. p. *Planters Ins. Co. v. Myers*, 55 Miss. 479. 1877.

§ 10. An agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums, and to take payment of premiums in cash or securities, and to give credit; the act of the clerk in all such cases is the act of the agent, and binds the company. *Bodine v. Exchange Fire Ins. Co.* 51 N. Y. 117. 1872. s. p. *Eclectic Life Ins. Co. v Fahrenkurg*, 68 Ill. 463. 1873.

§ 11. If company itself ignores a special authority and expressly gives or encourages an agent to exercise additional powers for several years, and ratifies and confirms the same, thus holding him out to the world as rightfully exercising all those powers, thereby inducing the public to believe in and rely upon his agency, company cannot after a loss repudiate his action and fall back upon written authority for the purpose of evading the legal effect of those acts. If company ratifies such acts people have a right to presume such continued acts within the scope of his authority, and act upon such presumption. *Farmers' Ins. Co. v. Taylor*, 73 Pa. 342. 1873.

§ 12. When company delivers blank receipts or certificates signed by its officers to an agent, with authority to deliver them to applicants, it is bound by alterations and erasures made in such papers by the agent before their delivery, although he may be acting in violation of his duty to the company. *Dayton Ins. Co. v. Kelley*, 24 Ohio, 345. 1873.

§ 13. There is no necessity for ratification of the acts of an agent authorized to procure insurance, when such

acts are within the scope of his authority. *Excelsior Fire Ins. Co. v. Royal Ins. Co.* 55 N. Y. 343. 1873.

§ 14. An agent of assured authorized to apply for permission to make an addition to policy, cannot be held to be his agent to consent to an abandonment or cancellation of the insurance. *Van Valkenburg v. Lenox Fire Ins. Co.* 51 N. Y. 465. 1873.

§ 15. Policy provided that it should not be valid unless countersigned by a duly authorized agent at a certain place. During such agent's absence his partner issued and signed a policy in *firm* name, which action was adopted and acted upon by former upon his return. The report of risk sent to general agent contained copy of the policy, and in it was notice of fact that it was issued in firm name. He expressed no dissent, but wrote for information in reference to risk itself. Premium was paid and received by company with knowledge of preceding facts. *Held*, that there was a ratification of the acts of agents in issue of policy, and that company was liable. *United Life Ins. Co. v. Ins. Co. N. A.* 42 Ind. 588. 1873.

§ 16. Agent having a general authority to act binds company by acts and declarations within ordinary and usual scope of his authority, although in excess of private or secret instructions. *Lattomus v. Farmers' Mut. Ins. Co.* 3 Houston, 404. 1873.

§ 17. Evidence showed that an insurance broker was in the habit of bringing applications for insurance to the company in behalf of others. The practice was, when policies were issued upon such applications, to charge the cash premiums to the broker, who collected them of the assured, and accounted for them to the company in monthly settlements. In a suit by the company against the broker to recover certain premiums paid, *Held*, that the evidence was competent to show course of dealing between the parties, the effect of which was to make the broker the agent of the company for the purpose of collecting the premiums. That company could not recover of the assured after payment to the broker, and that the

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money collected by latter was received by him to the use of the company. Insolvency of company is no defense to such an action. *Monitor Ins. Co. v. Young*, 111 Mass. 537. 1873.

§ 18. Where a company gives an agent blank certificates of insurance to be filled and signed by him, he is the agent of the company, and any limitation upon his authority not known to assured cannot affect the latter. *Wass v. Maine Mut. Ins. Co.* 63 Me. 537. 1873.

§ 19. When an agent of the company issues policy and renewal receipt with his name written upon them as completed instruments, company cannot object that they are not countersigned by such agent. *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241. 1874.

§ 20. When a policy is issued to a broker, it cannot be returned by him and a new one substituted in its place, without consent of the assured, or by his authority. *Bennett v. City Ins. Co.* 115 Mass. 241. 1874.

§ 21. An agent of a company which has become insolvent is liable to assured for return of premium, he being notified of such demand, and at time of its receipt not having paid over the money to the company. In such a case the company could not maintain an action against the agent for the premium, as the consideration for it has failed. *Smith v. Binder*, 75 Ill. 492. 1874.

§ 22. An insurance broker or solicitor has no authority to make binding contract of renewal, or waive condition as to prepayment of premium. *Hambleton v. Home Ins. Co.* 6 Biss. 91. 1874.

§ 23. Agent authorized to make parol contract of insurance may fill up policy after a loss. *Ins. Co. v. Colt*, 20 Wall. 560. 1874.

§ 24. Agent authorized by company to negotiate contracts of insurance, and intrusted with blank policies signed by the president and secretary, with authority to

fill up and deliver the same, can make parol contracts of insurance; and the fact that credit was given for premium cannot affect company's liability. The proper measure of damages in such a case is the amount agreed to be insured. *Angell v. Hartford Fire Ins. Co.* 59 N. Y. 171. 1874.

§ 25. Owner of property having sold it to plaintiff, wrote on back of policy an assignment and sent it by his son to a former agent of the company, whose authority had been revoked, and the son was so notified. He, however, subscribed what had been written on the policy: "This policy to enure to the benefit of C. S. Buchanan. A. T. Holmes, agent." And it was thus returned plaintiff. About two weeks later and day before the fire plaintiff delivered policy to his son, who at his request took it to the office of the company, informed the secretary of the transfer and facts, showing him the policy, and asked him if it was all right. Secretary said it was. *Held*, that the form of the memorandum was sufficient to show consent to the assignment; and that what took place in office of company could be regarded either as a ratification of what Holmes had done as an assumed agent, or as a consent then and there given. In either aspect company was bound. *Buchanan v. Exchange Fire Ins. Co.* 61 N. Y. 26. 1874.

§ 26. A local agent has no authority as such to receive notice of loss, and is not bound to communicate it to the company. *Edwards v. Ins. Co.* 75 Pa. 378. 1874.

§ 27. When a sub-agent signs and issues a policy for agent of company which is subsequently returned to the agent who, after having retained it for some days, re-delivers the policy to the insured after being informed of the facts of the case and then receives the premium, company is as much bound as though it was the original act of the agent himself. Evidence that other policies had been returned to the company signed by the sub-agent and that the premiums had been received on the same without objection is admissible as tending to prove that the company authorized or ratified the act of their agent

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in transacting its business through a sub-agent. *Grady v. American Central Ins. Co.* 60 Mo. 116. 1875.

§ 28. The rule that an agent cannot delegate his authority to act does not apply to mere ministerial acts to be performed. It is not necessary that the agent should do such acts in person; if he directs the act to be done or with a full knowledge of the act adopts it as his own, it is sufficient. *Grady v. American Central Ins. Co.* 60 Mo. 116. 1875.

§ 29. An agent authorized to take applications in so doing acts as the agent of the company and not of the assured. *Simmons v. Ins. Co.* 8 W. Va. 474. 1875. And see *Brugger v. State Investment Ins. Co.* 5 Sawyer, 304. 1878.

§ 30. Agent authorized to take risks and issue policies may waive by parol any condition in policy issued by him. *Winans v. Allemania Fire Ins. Co.* 38 Wis. 342. 1875. s. p. Waives prepayment premium by giving credit. *Taylor v. Germania Ins. Co.* 2 Dill. 282. 1872. *Young v. Hartford Ins. Co.* 45 Iowa, 377. 1877.

§ 31. Clause in policy making one who procures the insurance the agent of the assured is binding and operative; assured must be regarded as assenting to it when he accepts the policy. *Millville Ins. Co. v. Collerd*, 9 Vroom, N. J. L. R. 480. 1875.

§ 32. Person authorized to accept risks, to agree upon and settle terms of insurance, and to carry them into effect by issuing and renewing policies, must be regarded as the general agent of the company. *Pitney v. Glen's Falls Ins. Co.* 65 N. Y. 6. 1875.

§ 33. Possession of blank policies and renewal receipts signed by the president and secretary, is evidence of a general agency. *Pitney v. Glen's Falls Ins. Co.* 65 N. Y. 6. 1875.

§ 34. While agents or adjusters may have an implied authority to investigate into the origin and causes of a

fire, they do not have right in absence of express authority to institute criminal proceedings under a charge of arson. Company is not liable in an action for false imprisonment of the accused, unless agent's act in instituting the proceedings was expressly authorized or subsequently ratified. *Norman v. Ins. Co. of N. A.* 4 Ins. L. J. 827. 1875. U. S. Circuit, Ill.

§ 35. Agent to make surveys and to take applications has no authority to waive conditions requiring written consent. *Thayer v. Agricultural Ins. Co.* 5 Hun, 566. 1875.

§ 36. An agent has apparent authority only to insure in the modes authorized by the charter of the company, and upon the terms and conditions inserted in their policies in ordinary use. *De Grove v. Metropolitan Ins. Co.* 61 N. Y. 594. 1875.

§ 37. Local agents and adjusters have no authority to waive limitation clause, unless assured has been induced by their fraud to delay bringing his action. *Underwriter's Agency v. Sutherlin*, 55 Ga. 266. 1875.

§ 38. If agent's authority is limited to the taking of applications for insurance, notice to him does not bind the company. *Dickinson Co. v. Miss. Valley Ins. Co.* 41 Iowa, 286. 1875.

§ 39. Character and extent of agency is a question of fact for jury to determine. *Dickinson Co. v. Miss. Valley Ins. Co.* 41 Iowa, 286. 1875.

§ 40. An agent of company who fills up an application without the knowledge, request or authority of the assured, cannot be regarded as agent of the assured in so doing. *Hingston v. Aetna Ins. Co.* 42 Iowa, 46. 1875.

§ 41. Agent authorized to obtain insurance, having done so, has no authority to consent to its cancellation. *Latoix v. Germania Ins. Co.* 27 La. Ann. 113. 1875.

§ 42. Clause in policy making person who procures the insurance the agent of the assured in any transaction

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relating to the insurance, does not make such person the agent of the assured to receive notice of its termination. *White v. Connecticut Ins. Co.* 20 Mass. 330. 1876.

§ 43. The facts that a person is authorized to solicit insurances, receive and forward applications, and on receipt of the policy to deliver it and collect the premiums, and to collect the renewal premiums when in possession of the receipt of the company, and upon delivery of the same to the assured, are not sufficient as matter of law to make him a general agent. *Merserau v. Phoenix Mutual Life Ins. Co.* 66 N. Y. 274. 1876.

§ 44. The authority of a local agent authorized to receive applications for insurance and to countersign and deliver policies does not extend to adjusting of losses, or waiving of proofs. The mere fact that such an agent assumes in a particular case to do these acts cannot establish his authority. *Bush v. Westchester Fire Ins. Co.* 63 N. Y. 531. 1876. *Rev'g 2 T. & C. 629.*

§ 45. An insurance broker may be regarded by the company as clothed with full authority to act for the assured in procuring, modifying or cancelling a policy, and his acts in respect to the policy are same as if done by assured. *Standard Oil Co. v. Triumph Ins. Co.* 64 N. Y. 85. 1876. *Aff'g 3 Hun, 591; 6 T. & C. 300.*

§ 46. A local agent has no authority to waive condition requiring proofs of loss. *Van Allen v. Farmers' Joint Stock Ins. Co.* 64 N. Y. 469. 1876. *Rev'g 6 T. & C. 591.*

§ 47. Agents in the matter of the application, and all they do before the policy is issued, are the accredited agents acting within the apparent scope of their authority, and their acts bind the company. *Baker v. Home Life Ins. Co.* 64 N. Y. 648. 1876.

§ 48. When by written authority a person is authorized to act as "agent or surveyor," *Held*, that the word "surveyor" should not be construed to limit the word

agent. *Lycoming Fire Ins. Co. v. Woodworth*, 83 Pa. 223. 1876.

§ 49. Assured is bound by misstatement of a broker in a written application intrusted to him. *Samo v. Gore District Mut. Fire Ins. Co.* 26 Up. Can. C. P. 405. 1876.

§ 50. Agent authorized only to receive and forward applications has no power or authority to receive notice of the existence of other insurance. *Billington v. Canadian Mutual Fire Ins. Co.* 39 Up. Can. Q. B. 433. 1876.

§ 51. Application provided that company should be responsible for all surveys made by their agent personally. Agent who issued the policy requested previous owner to fill in a blank application, and when it was read over to the assured he objected to the distance between the buildings, whereupon the agent stated that he would not forward it until he had satisfied himself that it was correct. The agent had previously visited the premises himself. *Held*, that agent having taken upon himself to forward the application without further examination, that he did so from his previous survey, and that the defendants were responsible for it as a survey made by their agent in person. *Shannon v. Hastings Mut. Fire Ins. Co.* 26 Up. Can. C. P. 380. 1876. Aff'd 2 Tupper, 81.

§ 52. In an action brought by an agent against company for damages on account of a breach of its contract with him, the criterion of damages is to ascertain how much such agent has lost by the defendant's breach of the contract. The calculations of an actuary may be presumptive as showing what would be resorted to as showing the value of renewals on policies already obtained. In such case defendant should be allowed to show, in mitigation of damages, what the agent was making in another company during remainder of the time covered by the contract. *Lewis v. Atlas Mutual Life Ins. Co.* 61 Mo. 534. 1876.

§ 53. Company's insolvency or inability furnishes no excuse for a breach of its contract with an agent. If it

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desires to be exempted from liability in such an event, it should stipulate for the exemption upon the happening of the contingency. *Lewis v. Atlas Mutual Life Ins. Co.* 61 Mo. 534. 1876.

§ 54. Agents authorized to make contracts of insurance and issue policies, cannot delegate their authority to another. If assured takes a policy signed by "J. W. Hicksham, Agent, per Will. W. Kerr," it is sufficient to put him upon his guard as to the extent of authority. He has no right to take the policy and presume that Kerr was the agent of the company. *McClure v. Mississippi Valley Ins. Co.* 4 Mo. App. 148. 1877.

§ 55. Agent who has authority only to receive applications for insurance, to collect and transmit premiums, has no authority to waive conditions in the policy. *Baillie v. Provincial Ins. Co.* 21 L. C. Jurist, 274. 1877.

§ 56. Agent of company was authorized to take notes for farm risks, for which purpose he was furnished with blanks. He received note for insurance on a stock of goods without the assured having any notice or knowledge of any limitation upon his authority. Company having defended an action brought upon contract of insurance upon the ground of non-payment of the premium, *Held*, that a nonsuit was improper, and that the question of authority should be submitted to the jury. *Johnson v. Provincial Ins. Co.* 26 Up. Can. C. P. 113. 1876. On a subsequent trial a nonsuit was sustained on the ground of non-payment of the premium, it appearing that the note was not paid when due, it having been returned to the assured after the fire but before it was due, and retained by him, and he did not afterwards pay or offer to pay it. *27 Up. Can. C. P.* 464. 1877.

§ 57. Agent of company cannot be made agent of the assured by virtue of an agency clause in the policy. *Gans v. St. Paul Ins. Co.* 43 Wis. 108. 1877.

§ 58. Local agent had authority to receive applications for insurance, and was intrusted with blank policies

signed by officers of defendant, which he was accustomed to fill out and deliver without consultation with them. There was evidence to the effect that with knowledge and consent of defendant's officers, he had frequently issued policies upon property of the same class without submitting same for approval. Such agent having made an oral contract of insurance, *Held*, that the evidence was sufficient to sustain finding by jury that the contract was within the apparent scope of his authority, and that it was therefore binding. *Putnam v. Home Ins. Co.* 123 Mass. 324. 1877.

§ 59. A broker or solicitor may be the agent of the company, and a clause in policy making him the agent of assured cannot operate to change his character or status. *Bassall v. American Fire Ins. Co.* 2 Hughes, 531. 1877.

§ 60. An agent's authority as to third parties continues until the latter are in some way informed of its revocation. *Ins. Co. v. McCain*, 6 Otto, 84. 1877.

§ 61. If assured at time of application to *company's agent* has no knowledge of provisions of policy, and could not know that by it, the agent in taking the application was to be deemed his agent and not that of the company, he has the right to treat the agent as agent of the company and as possessing the power to agree upon premiums and to fill up the policy and deliver it to him as an operative instrument. *Gates v. Penn. Fire Ins. Co.* 10 Hun, 489. 1877.

§ 62. Knowledge of company's agent does not alone establish an agreement different from the one expressed in the policy. *Miaghram v. Hartford Fire Ins. Co.* 12 Hun, 321. 1877.

§ 63. When policy contains conditions that the one who procures the insurance shall be the agent of the assured, and also that the application must be made out by company's authorized agent, and application is made out by such agent, *Held*, that the former condition does not apply. *Sprague v. Holland Purchase Ins. Co.* 69 N. Y. 128. 1877.

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§ 64. A local agent of company, as such, does not have unlimited authority to represent his principal. Reynolds v. Continental Ins. Co. 36 Mich. 131. 1877.

§ 65. Authority of agent cannot be established by his assumption in doing the act relied upon. Reynolds v. Continental Ins. Co. 36 Mich. 131. 1877.

§ 66. Company is bound by the acts and declarations of its agent within apparent and general scope of his authority, and assured is not affected by limitation of such authority unless same is known to him. Rockford Ins. Co. v. Nelson, 65 Ill. 415. 1872. Eclectic Ins. Co. v. Fahrenkurg, 68 Ill. 463. 1873. Ins. Co. v. Lyons, 38 Tex. 253. 1873. Am. Cent. Ins. Co. v. McLanathan, 11 Kans. 533. 1873. Hartford Ins. Co. v. Farrish, 73 Ill. 166. 1874. Angell v. Hartford Fire Ins. Co. 59 N. Y. 174. 1874. Continental Ins. Co. v. Kasey, 25 Grat. 268. 1874. Georgia Home Ins. Co. v. Kinnier, 28 Grat. 88. 1876. Ins. Co. v. McCain, 6 Otto, 84. 1877.

§ 67. Notice to a soliciting agent authorized to receive and forward applications is notice to the company. Agency clause in a policy *subsequently delivered* cannot make him the agent of assured. Boetcher v. Hawkeye Ins. Co. 47 Iowa, 253. 1877.

§ 68. Agent has no power to revive a cancelled policy already rejected by the company without evidence of authority to rescind or recall the action of his principal. Such authority cannot be presumed. Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502. 1877.

§ 69. It is no part of an agent's duty to his company to look after insurance of other persons, and all that he does in that way, beyond what relates to insurance in his own company in the usual course of business and for premiums paid, is outside of his official character. As an insurance broker he represents the insured and not the insurer. Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502. 1877.

§ 70. A local agent authorized to make contracts of insurance has no authority as such to adjust losses or waive conditions. *Lohnes v. Ins. Co. of N. A.* 121 Mass. 439. 1877.

§ 71. When application itself states that the agent taking it is to be deemed the agent of the assured, the latter is bound by a false statement contained therein, even although inserted by the agent without putting the question to the applicant. *Bleakley v. Niagara District Ins. Co.* 10 Grant Ch. 198. 1869. And if the application contains no such clause, company is not bound by notice to and knowledge of agent for such purpose. *Billington v. Provincial Ins. Co.* 2 Tupper, 158. 1878. *Rev'g 24 Grant Ch. 299.*

§ 72. An insurance broker delivers a check for premiums to company's local agent, with directions to retain it until he could ascertain whether policy would be accepted by assured, and this condition is assented to by the agent, who agrees to retain it, and the assured refuses to accept the policy because it does not conform to the application, and this refusal is forthwith communicated to the agent, who further agreed to retain the check until corrections could be made, and the agent in violation of these agreements gives up the check to special agent of the company, to injury of the broker. *Held*, that upon these facts the broker was entitled to recover amount of check from the local agent. *Dobson v. Jordan*, 124 Mass. 542. 1878.

§ 73. Whether a broker is the agent of assured or of the company depends upon the knowledge of the assured; if he deals with broker as agent of the company, and receives the policy from him, and pays to him the premium under such belief, company is estopped by its act in delivering policy to the broker from availing itself of agency clause in the policy, and payment of premium to the broker is payment to the company. *Lycoming Fire Ins. Co. v. Ward*, 90 Ill. 545. 1878.

§ 74. Conversations with broker may be admissible as part of the *res gestae* upon the question of agency.

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§ 75. The question is not merely what the real authority of agent was, but what was his apparent authority, as shown by his acts, done with the knowledge and assent of the company. McCabe v. Dutchess Co. Mut. Ins. Co. 14 Hun, 599. 1878.

§ 76. If agent is authorized to indorse written consent upon the policy, he is authorized to waive conditions requiring such consent. McCabe v. Dutchess Co. Mut. Ins. Co. 14 Hun, 599. 1878.

§ 77. If an agent acting within the general scope of the business trusted to him fills up in his own language a written application from the statements of the assured fully and truthfully made, and receives the premium and issues the policy, the company shall not be permitted to defeat the contract by denying the truth of the application nor the authority of the agent, although he may have transcended his authority, unless the assured is chargeable with knowledge of his having exceeded his authority. Ins. Co. v. McGookey, 33 Ohio, 555. 1878.

§ 78. Agent of foreign insurance company who receives premium after revocation of the license of the company to do business in the State, is liable for the return of the premium to the assured, and such liability is not affected by the fact that he had no notice of the revocation of the license when he received the premium. McCutcheon v. Rivers, 68 Mo. 122. 1878.

§ 79. If an agent of company authorized to receive and forward application takes charge of the preparation of an application or suggests what shall be the answer or what will be sufficient answers, the company cannot avoid policy because they are false or untrue if full disclosures were made by the applicant to the agent. Under such circumstances the usual clause in the policy making the agent the agent of the assured is inoperative to prevent such effect. Planters' Ins. Co. v. Myers, 55 Miss. 479. 1879.

§ 80. The mere fact that application for insurance is forwarded to the office of the company for approval with knowledge of the assured, is not evidence that he had notice of any limitation upon the authority of such agent. American Ins. Co. v. Gallatin, 48 Wis. 36. 1879.

§ 81. When applicant leaves everything to the agent, and signs his name to a blank application, and the agent in filling it up makes a mistake as to the nature of the risk, the applicant is bound by it; the application containing clause that the agent should be deemed his agent and not the agent of the company. Sowden v. Standard Ins. Co. 44 Up. Can. Q. B. 95. 1879.

§ 82. By consenting to company's decision to terminate his authority and agency at end of calendar year, a general agent loses his claim to salary after that time. Southmayd v. Watertown Ins. Co. 8 Ins. L. J. 914. 1879. Wis.

§ 83. Agent of company cannot be made agent of assured. Eilenberger v. Protective Mut. Ins. Co. 89 Pa. 464. 1879. s. p. Broadhead v. Lycoming Ins. Co. 14 Hun, 452. 1878. Chase v. People's Fire Ins. Co. Id. 456.

§ 84. Agents who make contracts in behalf of company, can dispense with conditions contained therein. It is within the scope of their apparent powers and obligatory upon the company, unless assured is informed of their limitation. Knowledge of agent and his failure to cancel policy, or to inform the company of a fact occurring after issue of policy effecting a forfeiture without written consent indorsed, does not estop company from availing itself of the defense. Davey v. Glen's Falls Ins. Co. 9 Ins. L. J. 497. 1870. U. S. Circuit, Minn. s. p. Walsh v. Hartford Fire Ins. Co. 73 N. Y. 5. 1878. Rev'g 9 Hun, 421.

§ 85. The fact that the watchman or guard of the property of another who happens at the same time to be an insurance agent, does not thereby incapacitate him from writing a valid policy upon the property at the request of the owner. Northrop v. Germania Fire Ins. Co. 48 Wis. 420. 1879.

§ 86. Where party employs a broker to procure his insurance, who employs another broker who procures the policy, containing clause making party who procures the insurance the agent of assured, and policy is accepted by the latter, *Held*, that such acceptance is a ratification of the employment of the second broker, who under the condition as to agency must be deemed the agent of assured. *Grace v. Am. Central Ins. Co.* 16 Blatch. 433. 1879.

§ 87. A solicitor employed by a local agent of a company is the agent of the latter. *Davis v. Lamar Ins. Co.* 18 Hun, 230. 1879.

§ 88. Company is not bound by knowledge of a broker. *Ben. Franklin Ins. Co. v. Weary*, 4 Bradwell, 74. 1879.

§ 89. If assured intrusts a written application to a broker, it is sufficient to establish authority of the latter as his agent; notice to him or knowledge on his part of the use and occupancy of the premises does not bind the company who issues a policy upon such application. In such a case proposition that company, by delivery of its policy to the broker, clothes him with the badge of agency upon which the assured may rely in receiving the policy and paying his money thereon, has no application. *Fame Ins. Co. v. Mann*, 4 Bradwell, 485. 1879.

§ 90. Agent who takes an application on a form or blank sent to him by the company for the purpose, through a firm of insurance brokers, is the agent of the company, notwithstanding clause in policy making him agent of assured. The company is bound by his knowledge. *Partridge v. Commercial Fire Ins. Co.* 17 Hun, 95. 1879.

§ 91. Agency clause in policy cannot operate to make company's agent agent of assured. *Whited v. Germany Fire Ins. Co.* 76 N. Y. 415. 1879. Aff'g 13 Hun, 191.

§ 92. *Sembles* a broker may be the agent of the company as well as the assured, notwithstanding usual agency

clause in the policy. *Wood v. Firemen's Ins. Co.* 126 Mass. 316. 1879.

§ 93. When policy provides that it shall be void in case of double insurance, unless consent of directors is indorsed upon it, an agent has no authority to give such consent, and his neglect to indorse it upon policy will not excuse assured. *Behler v. German Mut. Ins. Co.* 68 Ind. 347. 1879.

§ 94. Assured, by acceptance of policy containing usual agency clause is bound by it, and a broker who obtains the policy must be regarded as his agent, notwithstanding the provisions of the statute of 1861, chapter 170 (Mass.). *Wood v. Firemen's Ins. Co.* 126 Mass. 316. 1879.

§ 95. Under Maine Statutes (R. S. c. 49, sec. 49), when annual license of agent expires, in order to renew it, a certificate that the agency continues, not a new appointment, is required of the company. *Schottish Com. Ins. Co. v. Plummer*, 70 Me. 540. 1880.

§ 96. *Semblé* broker's authority ends with delivery of policy. *How v. Union Mut. Life Ins. Co.* 80 N. Y. 39. 1880.

§ 97. Notice to an insurance broker, accustomed to receiving and forwarding applications and receiving and delivering policies, after policy is issued, is not notice to the company. His declaration when he solicits the insurance that he is company's agent does not bind the company. *Devens v. Mechanics & Traders Ins. Co.* 83 N. Y. 168. 1880.

§ 98. Assured may ratify unauthorized act of an agent in procuring insurance. *Walker v. Linn County*, 10 Ins. L. J. 666. 1880. Mo.

§ 99. Agent unable to take risk in any company represented by him, applied to another agent and obtained policy of defendant and delivered it to the assured. At time of delivery of the policy the former knew and

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consented to other insurance. The latter agent had no knowledge of the other insurance, and policy contained no consent. *Held*, by statute of Wisconsin (R. S. sec. 1977), that the agent who obtained and delivered the policy was the agent of the defendant, and that his knowledge and consent to other insurance bound the defendant, and that the defendant was estopped from claiming a forfeiture on ground of the other insurance. *Schoener v. Hekla Fire Ins. Co.* 10 Ins. L. J. 306. 1880. Wis.

§ 100. It is against the policy of the law for a person to act as agent for both the company and the assured. He cannot be the agent of both parties in the same transaction; if he so act the contract may be avoided by either party. *People's Ins. Co. v. Paddon*, 8 Bradwell, 447. 1881.

§ 101. Application for a policy having been made in writing to company, it has no right to rely on any verbal representations or statements made by a messenger or clerk sent by the broker to its agent, nor to assume that such statements or representations are made with knowledge and consent of the assured. *Dolliver v. St. Joseph Fire Ins. Co.* 10 Ins. L. J. 380. 1881. Mass.

§ 102. When company is advised of issue of policy by daily report of the agent, subsequently receives notice of loss, and proofs, and requires assured to submit to an examination under a clause in the policy, and receives and retains the premium, without ever offering to return it, or raising any objection as to authority of the agent until after action is brought, it is estopped to deny agent's authority to issue the policy upon property located out of his territory as specified in his written certificate of authority, of which the assured has no knowledge. *Knox v. Lycoming Ins. Co.* 10 Ins. L. J. 89. 1881. Wis.

§ 103. Agent who receives and forwards applications to general agent of company, receives policies, delivers them and collects premiums, is, under the New Hampshire statute, the agent of the company and not of the assured in framing application. Company is bound by his

knowledge of facts and his mistake in obtaining policy insuring interest of owner and mortgagor instead of interest of mortgagee as requested and so understood upon his representation. In such a case policy will be reformed to cover the interest as intended. *Sias v. Roger Williams Ins. Co.* 10 Ins. L. J. 500. 1881. U. S. Circuit, N. H.

§ 104. Policy contained condition that "no agent is empowered to waive any of its conditions without special authority in writing from the company." Held, that it applied to local agents and not to general agents, who, in absence of proof to the contrary, are presumed to possess authority to transact all business relating to insurance business of the company generally. *Carrigan v. Lycoming Ins. Co.* 10 Ins. L. J. 606. 1881. Vt.

See Adjustment, § 8. Alienation, 38, 62. Alteration, 3. Application, 2, 9, 11, 15. Cancellation, 11, 16, 17. Certificate, 14. Concealment, 7. Consummation of Contract, 5, 9, 11, 13. Description, 2. Estoppel, 1, 2, 7, 8, 9, 12, 14, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37. Evidence, 1, 28, 32, 52, 58, 61, 65, 74, 75, 82, 88, 90. Fraud and False Swearing, 7. Foreign Company, 1, 4, 10, 23, 36, 52. Increase of Risk, 18. Interest in Policy, 25. Lighting, 8. Mutual Company, 55, 62, 74, 124, 139, 154. Notice of Loss, 1, 3, 21. Other Insurance, 1, 5, 12, 33, 35, 45, 46, 51, 54. Parol Contract, 4, 5, 9, 13, 22, 28, 38, 34, 41. Pleading and Practice, 20, 26. Premium, 4, 9, 15, 18, 24. Proofs of Loss, 15, 30, 54. Questions for Court and Jury, 14, 17. Rebuild or Replace, 8. Reformation, 3, 11. Renewal, 2, 11. Removal Causes to U. S. Court, 1. Storing or Keeping, 18, 22. Title, 48, 57. Usage or Custom, 8, 9. Use and Occupation, 4, 9. Vacant or Unoccupied, 5, 13, 28, 40. Waiver, 2, 5, 8, 10, 11, 12, 18, 21, 23, 24, 26, 33, 34, 39, 45. Warranty and Representation, 34, 35, 37, 39, 40, 41, 53, 70, 81, 93, 107.

## ALIENATION.

§ 1. Condition avoiding policy in case of sale does not apply to a stock of goods kept for sale. *Wolf v. Security Fire Ins. Co.* 4 Abb. Ct. App. Dec. 286. 1868.

§ 2. Assured sold the property and himself indorsed the policy, "Payable in case of loss to Edward C. Bates," the purchaser, and sent it to defendant, with request that they consent to the indorsement, but did not notify them of the transfer. Company indorsed upon the policy, "Consent is hereby given to the above indorsement." Policy provided that if property was sold without consent of the company indorsed upon the policy, it should become void; that if sold it could be continued for benefit of purchaser if consent was given to be evidenced by a certificate of the fact, or by indorsement upon the policy. *Held*, that company merely consented in case of loss to property of the *assured* to pay the amount to the plaintiff, and did not consent that policy should continue for benefit of any one except the insured. Verdict for plaintiff set aside. *Bates v. Equitable Fire Ins. Co.* 3 Cliff. 215. 1868.

§ 3. Condition provided that if the "property be sold or conveyed" it should be void. *Held*, to avoid the policy assured must sell the *whole* of his interest; so long as he retains any interest policy is binding. *Scanlon v. Union Fire Ins. Co.* 4 Biss. 511. 1869.

§ 4. A sale by assured to three persons, one of whom re-conveys to him, and the other two giving him mortgages to secure the purchase-money, is an "alienation" avoiding the policy. *Home Mut. Ins. Co. v. Hauslein*, 60 Ill. 521. 1871.

§ 5. A sale and transfer of the property insured, taking a mortgage back for the purchase-money, is such a transfer or change in the title as avoids the policy. *Bates v. Commercial Ins. Co.* 2 Cin. Supr. Ct. 195. 1872.

§ 6. Where policy was issued to "the heirs and representatives of Andrew Kirk, deceased," and contained provision "if the property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, without the consent of the company indorsed thereon, policy shall be void," and the executrix sold the property without consent or knowledge of the company, to a party in possession under a lease, for \$8,000, taking back a mortgage for \$7,000. After which the executrix resigned and plaintiff was appointed trustee and administrator with will annexed. *Held*, plaintiff entitled to benefit of policy, although not specially named; and that policy was rendered void by the sale of the property by the executrix. *Savage v. Howard Ins. Co.* 52 N. Y. 502. 1873.

§ 7. If the assured is dead and the property insured is sold under proceedings in the orphans court, and the loss having occurred between the sale and the confirmation, there is no such alienation as avoids the policy. In such a case legal title is in the heirs of the assured, and the action on the policy is rightly brought in the name of the administrators to the use of the vendee. *Farmers' Mutual Ins. Co. v. Graybill*, 74 Pa. 17. 1873.

§ 8. A void sale is not an alienation. *School District v. Aetna Ins. Co.* 62 Me. 330. 1873.

§ 9. Assured having sold property took his policy to the broker who obtained it, who indorsed in pencil upon the back, "Loss, if any, payable to B. Transfer," and sent it to the defendant. The secretary read the memorandum, wrote on the policy, "Loss, if any, payable to B.," and affixed a stamp required only for a new policy, and returned it. *Held*, that the word "transfer" conveyed sufficient notice to the secretary of what was desired, and the real character of the transaction to which it must be assumed he assented. *Batchelor v. People's Ins. Co.* 40 Conn. 56. 1873.

§ 10. Condition provided that if "the interest of the parties should be changed" without written consent, pol-

icy should be void. The assured by a contract under seal contracted to sell the property to one Scudder, who paid part of the consideration. *Held*, that the contract of sale and payment constituted a change of interest. Germond v. Home Ins. Co. 2 Hun, 540. 1874.

§ 11. Policy provided that "in case any transfer or termination of the interest of the assured, or any part of his interest in the property hereby insured, either by sale, contract or otherwise, or in case any mortgage, lien or incumbrance shall be executed thereon, or shall attach thereto, or if the title thereto shall be in any way changed or affected after the date of this policy, or if any proceedings for sale thereof shall be had, commenced or taken, or if the title thereto shall be or become less than an absolutely perfect one without consent," it should be void. About a month previous to the fire the holder of a mortgage upon the property insured commenced proceedings to foreclose it by advertisement, and such proceedings were brought to the knowledge of the assured about two weeks before the fire, but no notice thereof was given to the defendant. *Held*, that so far as any obligation to give notice to defendant was concerned, assured was entitled to a reasonable length of time for that purpose after learning that proceedings had been commenced, and that "what would be a reasonable time" would be a question for the jury, and "that the policy was not avoided by the commencement of the foreclosure proceedings." Michigan State Ins. Co. v. Lewis, 30 Mich. 41. 1874.

§ 12. The effect of a "transfer or change of title" is not altered by the fact that the loss, if any, was made payable to a mortgagee, as it is not the latter's interest which is insured. Perry v. Lorillard Fire Ins. Co. 61 N. Y. 214. 1874.

§ 13. An adjudication in bankruptcy and an assignment by the register is a "transfer and change of title." Perry v. Lorillard Fire Ins. Co. 61 N. Y. 214. 1874.

§ 14. Property was sold and policy transferred February 22, 1869. March 3d plaintiff mailed policy to de-

fendant, requesting its consent to transfer. This was received on the fifth. Defendant's secretary answered declining to consent, inclosed check for unearned premium, and the policy was indorsed cancelled. Property was destroyed by fire on the fourth; of this defendant had no knowledge when its reply was written. Policy contained clause against sale or transfer, providing that in such case insurance should immediately cease. Also clause giving option to company of cancellation on notice and payment of return premium, and there was a by-law of the company requiring surrender of policy in such case. *Held*, that policy was void at time of fire because of the sale, and that assured was entitled to return premium only on surrender of the policy, and his failure so to do could not give any claim or continue liability of company. Buchanan v. Westchester Co. Mut. Ins. Co. 61 N. Y. 611. 1874.

§ 15. Policy contained clause against alienation, and also "the commencement of foreclosure proceedings or the levy of an execution shall be deemed an alienation of the property." A mechanic's lien on the building insured was foreclosed, execution issued, and sale advertised. *Held*, that the words "foreclosure proceedings" were not intended to refer to proceedings to enforce a mechanic's lien, that they had reference only to the foreclosure of a mortgage in the ordinary sense in which those terms are employed. That the "levy of an execution" had reference only to a levy on personal property, as a levy upon real estate is now unknown to the law. Colt v. Phoenix Fire Ins. Co. 54 N. Y. 595. 1874.

§ 16. The taking of a purchase-money mortgage cannot change the character or effect of the alienation or sale. Savage v. Howard Ins. Co. 52 N. Y. 502. 1873. s. p. Miner v. Judson, 2 Hun, 441. 1874.

§ 17. When policy provides that the entry of a foreclosure of a mortgage or the levy of an execution shall be deemed an alienation of the property and terminate the insurance, to have such effect there must be a complete and technical foreclosure or such a levy as divests the title. Pennebaker v. Tomlinson, 1 Coop. Ch. 598. 1874.

✓ § 18. The transfer of the interest of one partner to another is not such a transfer or assignment of an interest as will avoid the insurance. *Dermani v. Home Mut. Ins. Co.* 26 La. Ann. 69. 1874.

✓ § 19. A policy containing condition against alienation is avoided only by a transfer whereby assured parts with *all* his interest. A transfer by assured to a firm of which he is and remains one of the partners does not avoid policy. *Cowan v. Iowa State Ins. Co.* 40 Iowa, 551. 1875.

§ 20. Policy provided that it should be void in case of alienation and incumbrance. Also that assignment of it must be made 10 days after a sale of the property and that it must be sent to the office of the company forthwith for consent, which would then be given to the assignment. Property having been sold and consent of the company not having been obtained, suit being brought upon the policy, *Held*, that company was not absolutely bound to consent to the assignment, but that condition became operative only in case it had first consented to the sale of the property. *Home Ins. Co. v. Lindsey*, 26 Ohio, 348. 1875.

✓ § 21. When policy insures a partnership the sale of the interest of one partner to the other is not such an assignment or alienation as will avoid it. *West v. Citizens Ins. Co.* 27 Ohio, 1. 1875.

✓ § 22. When policy insures a partnership and one of the partners has retired having sold his interest to the other, the latter is entitled to sue and recover the whole amount of the loss. *West v. Citizens' Ins. Co.* 27 Ohio, 1. 1875.

§ 23. There can be no transfer of interest, where such transfer is invalid under the statute of frauds; and it is immaterial that the assured supposed that the title was changed. *Pitney v. Glen's Falls Ins. Co.* 65 N. Y. 6. 1875.

§ 24. Policy provided that it should be void in case the property should be sold or transferred or any change

should take place in title or possession, &c. It was issued to one Harlow Langdon and covered the dwelling-house of which he was the owner. After issue of policy and before the fire he and his wife conveyed the property to one Sargent by whom and his wife the same was conveyed to the wife of Langdon. *Held*, that there was such a change in the title of the property as precluded any recovery and that this result could not be affe<sup>t</sup>ed or prevented by the intention of the parties. *Langdon v. Minnesota Farmers' Mut. Fire Ins. Co.* 22 Minn. 193. 1875.

§ 25. A partial vacancy cannot amount to a change in the title or possession. *Bryan v. Peabody Ins. Co.* 8 W. Va. 605. 1875.

§ 26. A conditional sale cannot be construed as a mortgage to avoid effect of alienation. *Tatham v. Commerce Ins. Co.* 4 Hun, 136. 1875.

§ 27. Conveyance and sale without assent of company avoids policy. *Smith v. Union Ins. Co.* 120 Mass. 90. 1876.

§ 28. Condition against transfer or alienation does not extend to passing of the title consequent on the death of the assured. *Georgia Home Ins. Co. v. Kinnier*, 28 Grat. 88. 1876.

§ 29. Statute provided that if the assured should fail to notify company of any change in the title or ownership, and obtain the written consent of the company, that policy should be void. After the issue of the policy assured mortgaged the property and did not give notice or obtain consent. *Held*, to be a breach of the condition. The plaintiff could not recover. *Samo v. Gore District Mut. Fire Ins. Co.* 26 Up. Can. C. P. 405. 1876.

§ 30. Policy insured one Pomeroy "loss if any payable to Foote, mortgagee, as interest may appear." After its issue Pomeroy conveyed his interest in the premises to Foote, and at same time took back a bond for reconveyance of the same to him, his heirs, or assigns, upon payment of a sum named which was the amount due on the

mortgage. *Held*, that Pomeroy's deed effected a change of title within meaning of policy. *Foote v. Hartford Ins. Co.* 119 Mass. 259. 1876.

§ 31. An executory contract of sale without change of possession does not constitute a transfer or change of title. *Browning v. Home Ins. Co.* 71 N. Y. 508. 1877. *Aff'g 6 Daly, 522.*

§ 32. Policy provided that "when the property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured has ceased, the insurance shall terminate." *Held*, to mean a legal transfer which divests the party of title or control over the property. *Browning v. Home Ins. Co.* 71 N. Y. 508. 1877. *Aff'g 6 Daly, 522.*

§ 33. Policy insured Langer, official assignee, for benefit of creditors, another assignee of the estate being appointed. *Held*, that the policy did not vest by law in the new assignee, and that there was a violation of the condition to the effect that if the property was sold or transferred, or if any change should take place in the title or possession, &c., that the policy should be void, and that the interest of the assured expired upon the appointment of the new assignee. *Held further*, that in such a case an assignee ought to disclose his real interest. *Elliot v. National Ins. Co.* 21 L. C. Jurist, 242. 1877.

§ 34. The appointment of a receiver of partnership property pending a suit for dissolution of the partnership, effects no change in the title, nor does the possession of such receiver constitute a change of possession, within meaning of policy. *Keeney v. Home Ins. Co.* 71 N. Y. 396. 1877.

§ 35. A mortgage or deed of trust before its foreclosure does not amount to alienation or change of title. *Quarrier v. Peabody Ins. Co.* 10 W. Va. 507. 1877.

§ 36. The execution of a mortgage after issue of policy, sale of the property under a power of sale upon foreclosure of the mortgage by advertisement, pursuant to

statute, and a loss occurring before the period for redemption has expired, does not constitute such "a sale and transfer or change in the title as will render void the insurance." *Loy v. Home Ins. Co.* 24 Minn. 315. 1877.

§ 37. After the insurance was effected the assured, Shultis and Neil, admitted one Kribbee as a copartner, his interest being one-third. Subsequently Shultis sold out to his copartners, Neil and Kribbee, his interest in the partnership and the property insured, and they gave him a chattel mortgage upon the property insured to secure the price for which he had sold his interest. Policy provided that if the property be sold or transferred or any change should take place in the title or possession that it should be void. *Held*, that there was such a change as voided the policy. *Card v. Phoenix Ins. Co.* 4 Mo. App. 424. 1877.

§ 38. An assignment of the policy to a purchaser with consent of company's local agent indorsed, waives a forfeiture upon ground of alienation. *Amazon Ins. Co. v. Wall*, 7 Ins. L. J. 704. 1878. Ohio.

§ 39. Consent of company to a sale and transfer of property insured without knowledge of its terms extended by construction to include consent to the execution of a mortgage as part of the transaction. *Farmers' Ins. Co. v. Ashton*, 7 Ins. L. J. 594. 1878. Ohio.

§ 40. Sale of property under decree in foreclosure, time for redemption having expired, is an "alienation," notwithstanding a misdescription in the mortgage, and a second suit and decree therein prior to expiration of time for redemption, correcting the mistake. *McKissick v. Mill Owners' Mut. Ins. Co.* 50 Iowa, 116. 1878.

§ 41. Policy contained provision that "if, without the written consent of the company first had and obtained, the said property shall be sold or conveyed, or the interest of the parties thereto be changed in any manner, whether by act of the parties, or by operation of law," it should be void. Policy was issued for three years, April, 1872. Assured died November, 1872, leaving a will devising all

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his estate to four brothers, three of whom, including one appointed executor, were non-residents. Fire occurred August, 1874, previous to which the executor had died. Special administrator was appointed, who brought the action. *Held*, that the change of interest was such as to avoid the policy. *Sherwood v. Agricultural Ins. Co.* 73 N. Y. 447. 1878. *Aff'g* 10 Hun, 593.

§ 42. A sale in partition suit does not change the interest of assured until an order of confirmation of the sale has been granted by the Court. *Terpenning v. Agricultural Ins. Co.* 14 Hun, 299. 1878.

§ 43. Execution and delivery of a mortgage with power of sale is such an alienation and transfer or change of title and interest as will forfeit the policy. *Sossaman v. Pamlico Ins. Co.* 78 N. C. 145. 1878.

§ 44. A foreclosure of a mortgage, the equity of redemption having expired, effects a change in the title. *Brunswick Savings Inst. v. Commercial Union Ins. Co.* 68 Me. 313. 1878.

§ 45. Plaintiffs while acting as trustees of second mortgage bondholders, and insured as such, were in possession of and operating a railroad. While thus engaged they advanced and became personally liable for upwards of \$80,000, for benefit of the road. In a decree of foreclosure of the first mortgage this amount was declared a lien payable out of first earnings. *Held*, that plaintiffs' interest as trustees did not include their interest in the amount of the decreed lien, and could not prevent forfeiture on account of the sale in foreclosure of first mortgage. *Bishop v. Clay Ins. Co.* 45 Conn. 430. 1878.

§ 46. The sale under foreclosure of a railroad mortgage which has become absolute effects a "change of title" avoiding the policy. *Bishop v. Clay Ins. Co.* 45 Conn. 430. 1879.

§ 47. A sale of property for taxes being followed by its redemption as provided by statute does not effect such

an alienation as avoids the insurance. *Paquet v. Citizens' Ins. Co.* 4 Quebec L. R. 230. 1878.

§ 48. Execution of a mortgage held to be an alienation within meaning of the statute, sec. 39 of 36 Vic. ch. 44. *Mechanics' Society v. Gore District Ins. Co.* 3d Tupper, 151. 1878. Rev'd 40 Up. Can. Q. B. 220.

§ 49. A condition against alienation or assignment does not prevent the assured from executing a mortgage. *Sands v. Standard Ins. Co.* 26 Grant Ch. 113. 1878.

§ 50. A quit-claim deed, executed and delivered as security, does not constitute a breach of the condition against transfer or termination of interest of the assured. *Jecko v. St. Louis F. & M. Ins. Co.* 7 Mo. App. 308. 1879.

§ 51. A void conveyance cannot operate to transfer interest of the assured. *Jecko v. St. Louis F. & M. Ins. Co.* 7 Mo. App. 308. 1879.

§ 52. Where the contract is with A. to insure his interest, no alienation by another person of the property, in respect of which the insurance is effected, can affect or prejudice the rights of A. *Humphrey v. Hartford Fire Ins. Co.* 15 Blatch. 504. 1879.

§ 53. Where a policy is issued which covers personal property, such as hay, grain, live stock, &c., in a building, and property of the same description is subsequently mortgaged and placed in the building where the risk will attach to it under the general language used, and the insured claims payment for it as such mortgaged property, as being covered by the policy, then the subsequent chattel mortgage should be deemed a breach of the condition in the policy providing that if any change should take place in the title without consent of the company that it should be void; but if he made no claim for such property, the insurance upon the unincumbered property might not be effected by the fact that the mortgaged property was in the building at the same time, and destroyed with it. *Schumitsch v. American Ins. Co.* 48 Wis. 26. 1879.

§ 54. Under the Georgia Code the execution and delivery of a trust deed as security for a debt, and providing for a reconveyance upon its payment, does not amount to an *alienation*, but creates a lien only, which does not void the policy. *Virginia Fire Ins. Co. v. Feagin*, 62 Ga. 515. 1879.

§ 55. The execution of a mortgage is not a sale, transfer, or change of title which avoids the policy. *Byers v. Farmers' Ins. Co.* 9 Ins. L. J. 743. 1880. Ohio.

§ 56. Conveyance by deed absolute in form by owner and assured to mortgagee to whom loss is payable, in the absence of fraud, and no proof of any facts to control the effect of the deed, avoids the policy under clause rendering it void "if the property insured should be sold." *Dailey v. Westchester Fire Ins. Co.* 10 Ins. L. J. 383. 1880. Mass.

§ 57. The execution and delivery of a mortgage does not constitute a sale, transfer or change of title which avoids the policy. *Byers v. Ins. Co.* 35 Ohio, 606. 1880.

§ 58. An invalid sale of property insured under a mortgage is not such an alienation as will avoid the insurance. *Scammon v. Commercial Union Ins. Co.* 6 Bradwell, 551. 1880.

§ 59. Letting of house to tenants is not a change of title or possession. *Rumsey v. Phoenix Ins. Co.* 17 Blatch. 527. 1880.

§ 60. Policy was made payable to plaintiff as mortgagee. It contained a provision that it should be void if foreclosure proceedings were commenced against the assured. Plaintiff obtained a judgment of foreclosure of the mortgage, and caused premises to be advertised for sale a few days before the fire. *Held*, that there was a breach of the condition. That company's assent to the mortgage could not be extended by construction so as to include the foreclosure proceedings as a necessary incident of the mortgage. *Titus v. Glen's Falls Ins. Co.* 81 N. Y. 410. 1880.

§ 61. The giving of a chattel mortgage is a sale or incumbrance effecting a change of interest. *Dacey v. Agricultural Ins. Co.* 21 Hun, 83. 1880.

§ 62. Policy insured P. & E., partners. After its issue the interest of E. was without the knowledge or consent of the company assigned to plaintiff. The local agent of defendant was shortly thereafter advised of the assignment, and promised to obtain proper indorsement upon the policy. The policy contained a provision that if the property insured was conveyed, or the policy assigned without consent of the company indorsed upon it, it should be void, and that "no agent is empowered to waive any of the conditions of this policy either before or after loss without special authority in writing from the company." *Held*, that the transfer avoided the insurance as to the interest transferred, and that the agent did not waive the condition by his promise to obtain consent, and that the receipt of the premium after the transfer, with knowledge of the agent, does not create an estoppel. *Shuggart v. Lycoming Fire Ins. Co.* 55 Cal. 408. 1880.

§ 63. Policy provided that when any house or building insured should be alienated by sale or otherwise, it should become immediately void. It was issued to tenants in common. During the term of the policy one sold his interest in the property insured to his co-tenant, the plaintiff, who, at time of the fire, was the sole owner. *Held*, that the insurance was not thereby avoided; that the alienation contemplated by the condition was a sale by the insured to a party not insured, and that any transfer of interest between the parties insured is not an alienation within the meaning of the condition. *Lockwood v. Middlesex Mut. Ins. Co.* 47 Conn. 553. 1880.

§ 64. A notice filed in pursuance of the mechanics' lien law, does not effect any change of interest in the property insured. *Green v. Homestead Fire Ins. Co.* 82 N. Y. 517. 1880. Aff'g 17 Hun, 467.

§ 65. Policy provided that it should be void if property insured should "be sold or conveyed in whole or in

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part." Assured conveyed the whole by warranty deed, with release of dower to one Davis, who, at the same time and as part of the same transaction, conveyed it to the wife of the assured. *Held*, that policy was thereby avoided. *Oakes v. Manufacturers' Ins. Co.* 10 Ins. L. J. 346. 1880. Mass.

§ 66. A conveyance by deed valid as between the parties is such a change in the title as to render the policy void under usual condition against sale, transfer or change in title. *Baldwin v. Phoenix Ins. Co.* 10 Ins. L. J. 32. 1881. N. H. And see *Id. v. Hartford Ins. Co.* 10 Ins. L. J. 433. 1881. N. H.

§ 67. Policy provided that any "sale, transfer or change of title" should render it void. Assured conveyed the fee to one who reconveyed to him a life right to use and occupy. *Held*, that policy was rendered void. *Farmers' Ins. Co. v. Archer*, 10 Ins. L. J. 371. 1881. Ohio.

§ 68. When by express terms of the policy it is rendered void if property is sold or transferred, or policy assigned without consent of company indorsed, it is not enough that notice of the transfer or of the assignment be given to the company. Contract requiring consent, it must be obtained and indorsed on policy. Duty of procuring these things to be done rests with the assured. If he fails in his efforts or neglects to comply with the whole of the requirements contract is at an end by force of its own terms. No act of forfeiture is necessary to accomplish this result, nor is the omission of such an act any evidence of a waiver of company's rights. A waiver to be effectual must be intentional. *Girard Fire Ins. Co. v. Hebard*, 10 Ins. L. J. 425. 1881. Pa.

See Agent, § 25. Assignment, 4, 9, 18. Entirety and Divisibility of Policy, 7, 10. Evidence, 12, 62. Insurable Interest, 21, 34, 35. Interest in Policy, 25. Mutual Company, 51, 74, 77, 97, 145. Other Insurance, 48. Waiver, 4, 8, 15, 20.

## ALTERATION.

§ 1. Policy insured a stone building with a stone addition on one side, and a frame addition attached to the stone building on the other side. Assured, without consent, cut off eighteen feet of the frame addition, next the stone building, and placed same at rear end of the frame addition, thereby detaching the frame addition from the stone building. It was admitted that the risk was not thereby increased. There was no provision in the policy against alterations, or requiring consent to make improvements. *Held*, that the alteration did not avoid the insurance. *Dorn v. Germania Ins. Co.* 5 Ins. L. J. 183. 1878. U. S. Circuit, Ohio.

§ 2. If policy provides that an alteration of the use or occupation of the property shall avoid it, it is necessary to aver and prove that the risk is increased. *Johnston v. Canada Farmers' Ins. Co.* 28 Up. Can. C. P. 211. 1877.

§ 3. It appeared that plaintiff's business when he first insured was carried on in a store having two doors on the street, numbers 319 and 317, and adjoining a similar store with the number 315. During the first year the plaintiff rented the upper part of 315 and made a door between it and numbers 319 and 317, moving greater part of the goods to the other side of the wall. He closed the communication to the lower store 315, so that the door 319 was the only way that access to the goods could be had. At the expiration of the year the agent of the company visited the premises, examined the stock in the new store-room, and consented to a renewal for another year. *Held*, that there was not such a variation of the original contract as to constitute a new agreement, but only a slight change in the old consented to by the parties, and that the question of consent was properly left to the jury, and they having found in favor of the plaintiff that he was entitled to recover. *Rolland v. Citizens' Ins. Co.* 21 L. C. Jurist, 262. 1877.

See *Estoppel*, § 5. *Increase of Risk*, 2. *Use and Occupation*, 12, 15.

## APPLICATION.

§ 1. The addition to an application made without knowledge of assured, by secretary of company, bind the former by his retention of the policy without objection. *Lattomus v. Farmers' Mut. Ins. Co.* 3 Houston, 404. 1873.

§ 2. Assured cannot escape responsibility for statement of facts which he inserts himself in the application or permits an agent to insert as his upon which he is just as well informed as the agent himself. *American Ins. Co. v. Gilbert*, 27 Mich. 429. 1873.

§ 3. When a question in a written application is unanswered, and the risk is accepted upon such application, it is a waiver of any notice which the truthful answer to the interrogatory would have disclosed. *Dayton Ins. Co. v. Kelley*, 24 Ohio, 345. 1873.

§ 4. Statement in application that building is isolated, which it was in its ordinary sense, cannot be qualified or limited by a note *below* the signatures of the assured explaining that isolated means 100 feet from any building. *Pacaud v. Queen Ins. Co.* 21 L. C. Jurist, 111. 1876.

§ 5. Assured is not bound by a written application made part of the policy and signed by agent, without proof that he executed it, authorized it to be made, or ratified it after it was executed with knowledge of the facts. *Lycoming Ins. Co. v. Jackson*, 83 Ill. 302. 1876.

§ 6. If company acts upon an application with any question therein unanswered it waives information in respect thereto, and assured cannot be charged with concealment. *Sinclair v. Canadian Mutual Ins. Co.* 40 Up. Can. Q. B. 206. 1876.

§ 7. In making inquiries as to particular facts, company waives information in regard to others. *Browning v. Home Ins. Co.* 71 N. Y. 508. 1877.

§ 8. Company having issued its policy upon a written application containing a blank inquiry as to value unanswered, cannot afterwards avail itself of an oral statement as to value made at the same time, and claim it to be fraudulent. *Bardwell v. Conway Ins. Co.* 122 Mass. 90. 1877.

§ 9. When assured effects a policy through the agency of his own son who signs the assured's name to the application and whose duty it was before doing so to see that the matters therein stated were correct, the assured is bound by such application notwithstanding his inability to read and write. *Chatillon v. Canadian Mut. Fire Ins. Co.* 27 Up. Can. C. P. 450. 1877.

§ 10. A memorandum annexed to the application and delivered to agent at the same time by the assured, stating particulars of other existing insurance, must be considered and taken as a part of it. *Parsons v. Queen Ins. Co.* 43 Up. Can. Q. B. 271. 1878.

§ 11. Policy contained clause providing that if an agent should fill up an application he should be considered as acting for the applicant and not for the company; "but company would be responsible for all surveys made by their agent personally." After inspection of the risk the agent, with the assistance of a clerk selected by himself, filled an application to which it appeared the assured objected as not being correct, upon which the agent promised that he would go again to the premises and measure and alter the paper to suit such measurements. The agent notwithstanding adhered to the description and diagram already inserted by him in the application. *Held*, that the agent must be deemed the agent of the company so far as the application was concerned, and that the company was estopped from disputing its correctness. *Hastings Mutual Fire Ins. Co. v. Shannon*, 2 Can. Sup. 394. 1878.

§ 12. Proof of assured's signature to an application creates a presumption that he knew the contents. *Hartford Ins. Co. v. Gray*, 8 Ins. L. J. 611. 1879. Ill.

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§ 13. The fact that an application is written in pencil upon the blank of another company does not prevent its effect as a warranty when its identification is established by the number indorsed upon it and by the property proposed to be insured. *City Ins. Co. v. Bricker*, 91 Pa. 488. 1879.

§ 14. When policy provides that if building insured stands upon leased ground it must be so represented and expressed in the policy, a breach of such condition avoids the insurance, notwithstanding an omission to inquire as to such facts in the application. *Ross v. Citizens' Ins. Co.* 3 Pugsley & B. N. B. 126. 1879.

§ 15. Although assured cannot be prejudiced by anything wrongfully written in his application by company's agent, he is bound by acceptance and retention of the policy a reasonable time without objection. When facts are clearly established, what is a reasonable time is a question of law which must be determined by the court. *Swan v. Watertown Fire Ins. Co.* 10 Ins. L. J. 392. 1880. Pa.

§ 16. Application referred to and made part of the policy must be treated together as constituting the compact, as if both were embodied in one paper. *Byers v. Ins. Co.* 35 Ohio, 606. 1880.

See Agent, § 6, 40, 49, 51, 71, 77, 79, 81, 90, 101, 103. Consummation of Contract, 13. Encumbrance, 6. Estoppel, 23, 25. Evidence, 17, 48, 87. Insurable Interest, 38. Mutual Company, 39, 49. Over Valuation, 4. Pleading and Practice, 25, 28, 31. Reformation, 11. Title, 19, 37, 42, 46, 51, 56. Use and Occupation, 14. Waiver, 42. Warranty and Representation, 23, 28, 40, 45, 53, 64, 70, 84, 90, 93, 97, 107.

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## ARBITRATION AND APPRAISEMENT.

§ 1. Where policy provides for furnishing of inventory and an appraisal of the damages, the furnishing of the former by the assured is all that he is required to do, unless the company offers to have appraisers appointed. *Commercial Ins. Co. v. Robinson*, 64 Ill. 265. 1872.

§ 2. Submission to and award by appraisers is not binding unless made so by agreement. *Patterson v. Triumph Ins. Co.* 64 Me. 500. 1874.

§ 3. Condition providing for arbitration cannot operate to deprive assured of his right of action, unless clearly made a condition precedent to the existence of such right. *Liv. L. and G. Ins. Co. v. Creighton*, 51 Ga. 95. 1874.

§ 4. In order for an insurance company to avail itself of the arbitration clause of a policy, it must show that they admitted the validity of the policy, and that the only question is as to the extent of the loss. Parties may agree that when the dispute is limited to the extent of the damage and question of value, that it shall be determined by appraisement. Such an agreement, like any other agreement of reference, is revocable, though the party may subject himself to an action for damages for the revocation. Such an agreement does not operate to oust the courts of jurisdiction. *Mentz v. Armenia Fire Ins. Co.* 79 Pa. 478. 1875.

§ 5. The arbitration clause *held* a barrier to recovery at law unless there is proved a demand for an arbitration by the assured, and a refusal or neglect or an express waiver by the company. *Flaherty v. Germania Ins. Co.* 7 Ins. L. J. 226. 1875. Pa.

§ 6. Policy provided that in case of damage the goods should be forthwith put in as good condition as the case would allow, the assured assorting and arranging the various articles, separating the damaged from the undam-

aged goods, then list or inventory of the whole to be made, naming qualities, quantities, etc., after which the amount of damage should be ascertained by examination and appraisal, the report of the appraisement to be in writing. *Held*, that these provisions applied only where claim is made for goods partially damaged or destroyed, and that they did not apply where a total loss only was claimed. Williamson v. Hand-in-Hand Mut. Ins. Co. 26 Up. Can. C. P. 266. 1876.

§ 7. If policy merely contains an agreement to refer a matter upon which liability arises to arbitration, it does not take away right of action. But if the agreement be, not simply to pay a sum of money, or to do an act, but to pay *such* sum of money, or do *such* an act, as a third person shall ascertain or direct, or to pay a sum of money or do an act *in a certain event*, such, for instance, as an arbitrator arriving at a certain conclusion, in any of these cases no cause of action arises, unless, in the one case, the third person has so ascertained or directed, or, in the other, the stipulated event has happened. Gorman v. Hand-in-Hand Ins. Co. Irish Rep. 11 C. L. 224. 1877.

§ 8. When statute provides that the amount written in the policy is conclusive upon the question of value and the only measure of damages, stipulation in policy as to arbitration is inoperative. Thompson v. St. Louis Ins. Co. 43 Wis. 459. 1877. Thompson v. Citizens' Ins. Co. 45 Wis. 388. 1878.

§ 9. Policy provided that if differences should arise after proofs were received, that at written request of either party matter should be submitted to arbitrators whose award should be binding as to amount, but not as to liability, and also that no action should be sustainable until after such award should be obtained. *Held*, that the condition did not suspend assured's right of action. That it was merely collateral and not a condition precedent. Scholtenberger v. Phoenix Ins. Co. 7 Ins. L. J. 697. 1878. U. S. Circuit, Pa.

§ 10. Company waives right to arbitration by omitting to make request as provided in the policy during the

sixty days preceding time when loss becomes due and payable. *Gibbs v. Continental Ins. Co.* 13 Hun, 611. 1878. And same when company insists it is not liable for *any* loss. *Id.*

§ 11. When company denies all liability the arbitration clause is not operative. *Lasher v. Northwestern Nat. Ins. Co.* 18 Hun, 98. 1879.

§ 12. An award made in the absence of a chosen arbitrator, without notice and consent, has no validity. *Hills v. Home Ins. Co.* 9 Ins. L. J. 814. 1879. Mass.

§ 13. Assured cannot be relieved from award of arbitrators, even although he was induced by a mistaken assertion of company's agent in regard to condition in policy to consent to arbitration, he having the opportunity of examining the policy before signing the submission. *Wheeler v. Watertown Fire Ins. Co.* 10 Ins. L. J. 354. 1880. Mass.

§ 14. When policy provides that an arbitration shall be had upon the written request of either party, it is necessary to aver and prove such written request to make condition operative. *Wallace v. German American Ins. Co.* 1 McCrary, 335. 1880.

§ 15. Policy provided that "damage to property not totally destroyed, unless agreed upon, shall be appraised by disinterested and competent persons mutually agreed upon by the parties; when personal property is damaged, assured shall make an inventory thereof, and upon each article the damages shall be separately appraised, and the report of the appraisers shall form part of the proofs, and until such proof and certificates are produced loss shall not be payable." The insurance was upon a building, which the jury found was totally destroyed. Company insisted that an appraisal was a condition precedent to amount being due. *Held*, doubtful whether condition was not void for uncertainty, but that if it was valid, it did not apply to a case where the dispute was as to whether loss was *partial* or *total*, and that so far as an appraisal was made a condition precedent by the condition

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it had reference only to personal property. *Williams v. Hartford Ins. Co.* 54 Cal. 442. 1880.

§ 16. Policy provided that in case differences shall arise touching any loss or damage after proof has been received in due form, the matter shall, at written request of either party, be submitted to impartial arbitrators whose award in writing shall be binding as to the amount of such loss or damage, but shall not decide the liability of the company under this policy. It is furthermore expressly agreed that no suit shall be sustainable in any court of law or equity until after award shall have been obtained fixing the amount of such claim in the manner above provided. *Held*, that the condition as to arbitration was not a condition precedent but collateral to the agreement to pay. *Mark v. National Fire Ins. Co.* 24 Hun, 565. 1881.

See Agent, § 8. By-Laws and Conditions, 8, 15. Construction, 15. Proofs of Loss, 48, 65. Questions for Court and Jury, 10. Waiver, 29.

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## ASSIGNMENT.

§ 1. An invalid assignment of the policy cannot defeat the insurance. *Crozier v. Phoenix Ins. Co.* 2 Hannay, N.B. 200. 1870.

§ 2. Assignee takes policy subject to its conditions, and if his assignor has lost all right of recovery, he acquires no rights. *Kane Mut. Ins. Co. v. Hauslein*, 60 Ill. 521. 1871. s. p. *Burger v. Farmer's Mut. Co.* 71 Pa. 422. 1872. *Smith v. Niagara Dist. Ins. Co.* 38 Up. Can. Q. B. 570. 1876. *Kanaday v. Gore Dist. Ins. Co.* 44 Up. Can. Q. B. 261. 1879.

§ 3. Under Iowa statute (Rev. Sec. 2757) policy may be assigned although prohibited by condition in it. *Mershon v. National Ins. Co.* 34 Iowa, 87. 1871.

§ 4. A sale of the property cannot operate as a transfer of the policy by law. *Forgie v. Royal Ins. Co.* 16 L. C. Jurist, 34. 1871.

§ 5. When condition prohibits an assignment of the policy without consent, it is rendered void by such assignment, although it may have been made merely as and for the purpose of collateral security, and the assured cannot prevent such an effect by payment of the debt after the fire. *Ferree v. Oxford Fire Ins. Co.* 8 Phil. Rep. 512. 1871.

§ 6. Company remains liable to assignee of claim if it pays to assured after notice of the assignment. *Hall v. Dorchester Mut. Fire Ins. Co.* 111 Mass. 53. 1872.

§ 7. Assignee of policy after a loss takes it subject to all equities and defenses which attach to it in hands of assured. *Semble* otherwise where company assents to the assignment, or by its act or conduct induces the assignee to take the same under a belief that no claim exists against the assured. *Johnston v. Phoenix Ins. Co.* 39 Md. 233. 1873.

§ 8. An assignment of policy for less than the claim under it obtained by representative of company by false representations of its ability to pay amount due, will be decreed void in equity. *Derrick v. Lamar Ins. Co.* 74 Ill. 404. 1874. *s. p. Burnham v. Lamar Ins. Co.* 79 Ill. 160. 1875.

§ 9. Entry in policy register of company "transferred to William D. Griswold," made at the instance of the assured, is effectual to vest a right to the insurance in such party on the ground that the defendant accepted Griswold as the insured instead of the original assured. *Griswold v. American Central Ins. Co.* 70 Mo. 654. 1874.

§ 10. Assured may assign his claim after a fire to a creditor to extent of the debt. *Daniels v. Meinhard,* 53 Ga. 359. 1874.

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§ 11. Policy cannot prohibit an assignment of a claim after loss. *Pennebaker v. Tomlinson*, 1 Coop. Ch. 598. 1874.

§ 12. An assignment of all personal property of any nature or kind whatever, except books and book accounts, which belong to the insured, cannot operate to convey any right and interest of the insured in a policy of insurance to the assignee. *White v. Robbins*, 21 Minn. 370. 1875.

§ 13. The insertion of a clause in policy making loss payable to a third party does not operate as an assignment of it. *Martin v. Franklin Fire Ins. Co.* 9 Vroom N. J. L. R. 140. 1875.

§ 14. Policy covered a certain amount on dwelling house and on furniture and clothing therein. Property was sold by the assured to another and the policy assigned to the purchaser with consent of the company. The furniture and clothing belonging to the assured were not sold, but were removed. The purchaser put in the house his own furniture and clothing which was burned. *Held*, that by the consent of the company to the assignment of the policy to the purchaser there was a new and original contract to indemnify him according to the terms of the policy and that the company was liable for the loss on furniture and clothing of the purchaser and assignee. *Cummings v. Ins. Co.* 55 N. H. 457. 1875.

§ 15. Policy covering personal property and building was assigned with consent of the company to a mortgagee who held a mortgage upon the land, but had no claim whatever to the chattels insured. After the fire the mortgagee re-assigned the policy and claim thereunder to the assured and plaintiff, first having received the amount of damage upon the building insured. *Held*, that the mortgagee had nothing to assign in reference to the personal property, and that therefore plaintiff could not recover. *Hazzard v. Canada Agricultural Ins. Co.* 39 Up. Can. Q. B. 419. 1876.

§ 16. Assignee of insured property, who becomes by consent assignee of the policy and applies for a renewal, is bound only by correctness of the original application so far as it is applicable to the circumstances existing at the time of the renewal. The undertaking or agreement on his part is simply that the facts stated in the original application are true at the time of the renewal. Chapman v. Gore District Mut. Ins. Co. 26 Up. Can. C. P. 89. 1876.

§ 17. When the loss is made payable to a third party, as interest may appear, there is no necessity for an assignment of the policy so long as no new party is introduced, and the only change is one made by an arrangement between the assured and the payee. Burbank v. McCluer, 54 N. H. 339. 1877.

✓ § 18. The assignment or release of the interest of one partner to another is neither an assignment of the policy or transfer of the property as will avoid the insurance. Texas Ins. Co. v. Cohen, 47 Tex. 406. 1877.

§ 19. *Semble* policy cannot be assigned after a *partial* loss. Kerr v. Hastings Mutual Ins. Co. 41 Up. Can. Q. B. 217. 1877.

§ 20. A provision prohibiting assignment of the policy before a loss, is valid and will be enforced. Stolle v. Aetna Ins. Co. 10 W. Va. 546. 1877.

§ 21. If an assignment agreed to be made before a loss is not actually delivered until after it, it becomes operative only from the time of such delivery, and then as an assignment of a money demand against the company. Watertown Ins. Co. v. Grover & Baker Sewing Machine Co. 41 Mich. 131. 1879.

§ 22. If, when policy is issued, the assured has no insurable interest, he can confer no rights upon an assignee by an assignment. McCluskey v. Providence Ins. Co. 126 Mass. 306. 1879.

§ 23. Assignment of policy without written consent as required by its terms, renders it void. *Waterhouse v. Gloucester Fire Ins. Co.* 69 Me. 409. 1879.

§ 24. Policies of fire insurance are not assignable at law without the consent of the insurer, nor in equity can an assignment be ever made to enure to the benefit of the assignee where there is violation of any condition of the policy by such assignment. *Jecko v. St. Louis F. & M. Ins. Co.* 7 Mo. App. 308. 1879.

§ 25. Assured who has parted with all interest in the property insured can transfer no rights under the policy by assignment after the loss. *Jecko v. St. Louis F. & M. Ins. Co.* 7 Mo. App. 308. 1879.

§ 26. Assignment after a loss has occurred is not an assignment of the policy, but of the claim for the insurance, and is not within the condition against assignment in the policy. *Combs v. Shrewsbury Mutual Fire Ins. Co.* 5 Stew. N. J. Eq. R. 512. 1880.

§ 27. When policy has been assigned and delivered before the loss to a third party as collateral security for a debt, which is subsequently paid and satisfied, and is after the loss again assigned to another party, the latter may have relief in equity. *Combs v. Shrewsbury Mutual Fire Ins. Co.* 5 Stew. N. J. Eq. R. 512. 1880.

§ 28. Policy may be assigned by parol and a delivery for a valuable consideration. An equitable assignment under provisions of New York Code is in effect a legal assignment. *Greene v. Republic Ins. Co.* 10 Ins. L. J. 422. 1881. N. Y.

See *Alienation*, § 20, 33, 38, 62. *Estoppel*, 20, 33. *Interest in Policy*, 17. *Mortgagor and Mortgagee*, 9, 24, 35, 38, 43, 46. *Mutual Company*, 7, 10, 11, 31, 74, 97, 144. *Notice of Loss*, 20. *Other Insurance*, 16, 49. *Proofs of Loss*, 29. *Re-insurance*, 3. *Renewal*, 1. *Waiver*, 20. *Who May Sue*, 19.

## BONDS OF AGENTS.

§ 1. The death of a surety upon an agent's bond does not discharge his estate from liability for default of agent happening afterwards. *Royal Ins. Co. v. Davies*, 4 Ins. L. J. 865. 1875. Iowa.

§ 2. Condition of agent's bond being that he "should keep true and correct books of account," the book, kept by him, containing entries of the business of the company only, made by clerks employed by firm of which such agent is a member, is competent evidence against him and his sureties of the amount of premiums collected. *Williamsburg Ins. Co. v. Frothingham*, 122 Mass. 391. 1877.

§ 3. In a suit brought upon an agent's bond against the sureties, the latter may require the company to produce, as necessary to the defense, contracts between such company and other companies which were represented by the same agent, and who were also parties to the bond. *Germania Fire Ins. Co. v. Circuit Judge*, 41 Mich. 258. 1879.

§ 4. Agent's bond contained a stipulation that the laws of New York were to control in determining the liability of the obligors, as if the bond had been made in that State. There was no evidence of any difference between the laws of New York and Maine. *Held*, that contract must be construed according to the laws of Maine. *Scottish Com. Ins. Co. v. Plummer*, 70 Me. 540. 1880.

§ 5. William H. Van Horn had been acting as agent of the Watertown Ins. Co. to March, 1878, at which time there was a balance due the company of uncollected premiums to the amount of \$400. About same time Perkins and Van Horn were appointed agents, and gave a bond for faithful performance of their duty, signed by plaintiff in error Ball as surety. June 1, 1878, Perkins and Van Horn gave their firm note to the company for \$473 77, to balance their account as it stood April 1, 1878. Action

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was brought upon the bond to recover amount due upon the note. There was evidence that the firm had for a consideration assumed and agreed to pay balance due company from Van Horn at expiration of his agency. *Held*, that surety was not liable for money collected and retained by Van Horn, and that under such circumstances the note should be treated as an accommodation note, but that if the firm had collected premiums on the old business, the bond covered them. *Ball v. Watertown Ins. Co.* 9 Ins. L. J. 662. 1880. Mich.

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### BOOKS OF ACCOUNT AND VOUCHERS.

§ 1. It is a sufficient excuse for non-production of books that they were destroyed by the fire. *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315. 1874.

§ 2. Policy required assured to produce certified copies of all bills and invoices the originals of which were lost. Jury were charged in effect that assured showed sufficient compliance by proof that he had furnished such copies as he had in his possession, and that it was for them to say whether he had given all the information he had, and that if he had done so, he was entitled to recover. *Held*, error. That assured was bound to furnish, in such a case, certified copies from the sellers of the goods, unless it is impossible to obtain them, or condition is waived. *O'Brien v. Commercial Fire Ins. Co.* 63 N. Y. 108. 1875. *Rev'g 6 J. & S. 4.*

§ 3. When, by destruction of books and vouchers by the fire, it is impossible for the assured to furnish them as required by the condition, it is sufficient to furnish an affidavit of value of property lost. *Perry v. Niagara District Mut. Ins. Co.* 21 L. C. Jurist, 257. 1877.

§ 4. Where notice requires production of books *after* the proofs called for by same notice are furnished, if there

is no obligation on part of assured to furnish proofs as demanded, the non-production of the books cannot be construed as a refusal to produce them. *Keeney v. Home Ins. Co.* 71 N. Y. 396. 1877.

§ 5. If there is any question as to the inability of the assured to procure and furnish duplicate bills of purchase, it is error to take the case from the jury. *Farmers' Fire Ins. Co. v. Mispelhorn*, 50 Md. 180. 1878.

§ 6. Assured must comply with condition requiring him to furnish bills of purchase or duplicates, unless waived, or performance has become impossible, without fault of his own. *Farmers' Fire Ins. Co. v. Mispelhorn*, 50 Md. 180. 1878.

See Burden of Proof, § 2. Evidence, 77. Proofs of Loss, 4, 51.

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## BURDEN OF PROOF.

§ 1. When insurable interest is put in issue by a special plea, the burden of proof rests upon the plaintiff, and under such circumstances it is error to charge the jury that if the proof is equally balanced the jury must find for the plaintiff. *Ins. Co. v. Diggs*, 8 Baxt. 563. 1876.

§ 2. Demand having been made that the assured furnish duplicate bills of purchase, the burden of proof rests upon him to show that it was not possible for him to comply with the terms of the condition by the use of all reasonable means within his power. *Mispelhorn v. Farmers' Fire Ins. Co.* 53 Md. 473. 1879.

§ 3. Loss by fire being admitted, the burden of proof is on the company claiming exemption from liability to show that it falls within the exceptions. *Portsmouth Ins. Co. v. Reynolds*, 32 Grat. 616. 1880.

See Storing and Keeping, § 18. Vacant or Unoccupied, 6.

## BURNING BY DESIGN.

§ 1. Where defense is intentional firing, amount offered as rent for the property is competent evidence as bearing upon the question of motive. *Hotchkiss v. Germany Fire Ins. Co.* 5 Hun, 90. 1875.

§ 2. The *validity* of a policy is not an essential element of proof on a trial of an indictment for arson. *State v. Byrne*, 45 Conn. 273. 1877.

§ 3. To sustain the defense of willful burning, company is not required to prove commission of the offense beyond all reasonable doubt, as required in a criminal proceeding. In such a case it is the duty of the jury to find for the party in whose favor the evidence preponderates. *Kane v. Hibernia Ins. Co.* 10 Vroom, N. J. L. R. 697. 1877. *Huchberger v. Merchants Ins. Co.* 4 Biss. 265. 1868. *Etna Ins. Co. v. Johnson*, 11 Bush, 587. 1875. *Simmons v. Ins. Co.* 8 W. Va. 474. 1875. *Blaeser v. Milwaukee Mut. Ins. Co.* 37 Wis. 31. 1875. *Rothschild v. Am. Cent. Ins. Co.* 62 Mo. 356. 1876. *Farmers' Mut. Ins. Co. v. Gargett*, 42 Mich. 289. 1879.

§ 4. *Semble* that the willful burning by wife of the assured without his privity, is covered by the ordinary fire policy. *Midland Ins. Co. v. Smith*, Law Rep. 6 Q. B. D. 561; 24 Alb. L. J. 139. 1881.

See Agent, § 34. Evidence, 84. Pleading and Practice, 28.

## BY-LAWS AND CONDITIONS.

§ 1. Policy is not made absolutely void by a breach of its conditions, but is voidable only at option of the company. *Canada Land Company v. Canada Agricultural Ins. Co.* 17 Grant Ch. 418. 1870.

§ 2. Assured bound to take notice of terms of policy; his neglect to make himself acquainted with its provisions cannot enlarge company's liability. *Pindar v. Resolute Fire Ins. Co.* 47 N. Y. 114. 1871. And see *Reynolds v. Commerce Fire Ins. Co.* Id. 604. 1872.

§ 3. Policy provided that company should not be liable for any loss or damage by fire occasioned by earthquakes or hurricanes or by burning of forests, and that it should remain suspended and of no effect in respect of any loss or damage (*however caused*) which shall happen or arise during the existence of any of the contingencies aforesaid. *Held*, that under such a condition the fact that at the time of the loss neighboring forests were burning is sufficient to prevent a recovery. *Commercial Union Ins. Co. v. Canada Manufacturing Co.* 18 L. C. Jurist, 80. 1873.

§ 4. An alteration of policy by subsequent agreement is ineffectual unless made and delivered to other party with the knowledge and consent of party executing it. *Hoffecker v. N. C. M. Ins. Co.* 4 Houst. (Del.) 306. 1874.

§ 5. Ignorance of assured of conditions in policy cannot deprive the company of their benefit. *Ervin v. N. Y. Cent. Ins. Co.* 3 T. & C. (N. Y. Sup.) 213. 1874. s. p. *Monitor Mut. Ins. Co. v. Buffum*, 115 Mass. 343. 1874.

§ 6. A forfeiture depends upon election of the company. *Pratt v. N. Y. Central Ins. Co.* 55 N. Y. 505. 1874.

§ 7. Assured by acceptance of the policy is bound by its terms and conditions, whether he could or could not make himself acquainted with its contents; his want of

knowledge of the English language is no excuse. Fuller v. Madison Mutual Ins. Co. 36 Wis. 599. 1875.

§ 8. When the value of the property is trifling in amount and there is no proof that its value could have been improved, there is nothing in the point that the assured failed to put the damaged property in the best possible order after the fire. Wright v. Hartford Fire Ins. Co. 36 Wis. 522. 1875.

§ 9. There can be no modification of the terms of a policy by effect of a resolution of the directors of the company made subsequently to its issue, but never known or assented to by the assured. Martin v. Mutual Fire Ins. Co. 45 Md. 51. 1876. s. p. Planters' Mut. Ins. Co. v. Engle, 52 Md. 480. 1879.

§ 10. *Semblé* that the operative force of every condition in an insurance policy (in Canada) is made by statute to depend upon the opinion of the court as to whether the conditions are just and reasonable, and if it does not so hold they shall be absolutely null and void. 36 Vic. ch. 44, sec. 33. Morrow v. Waterloo County Mutual Fire Ins. Co. 39 Up. Can. Q. B. 441. 1876.

§ 11. The conditions of a policy indorsed in small type upon the back of it are not part of it to bind the assured, unless they are distinctly drawn to the attention of the insured at the time of the contract. Bassell v. American Fire Ins. Co. 2 Hughes, 531. 1877.

§ 12. Fraud on part of the insured in obtaining insurance voids it without any express provision in the policy to that effect. Moore v. Virginia Fire Ins. Co. 28 Grat. 508, 524. 1877.

§ 13. Company cannot avail itself of conditions of insurance prescribed by the statute (39 Vic. ch. 24), unless such conditions are printed on the policy, and if the company has neglected to print such conditions, it must be held as against the assured that the policy is issued without conditions of any kind. Frey v. Mutual Fire Ins. Co. 43 Up. Can. Q. B. 102. 1878.

§ 14. The legal effect of the statutory conditions printed in a policy is not altered by size of the type. *Balagh v. Royal Mut. Ins. Co.* 44 Up. Can. Q. B. 70. 1879.

§ 15. When policy does not comply with the statute prescribing conditions of insurance, it must be treated as one without any conditions, and that therefore a condition as to arbitration, *Held*, not to be a defense. *McIntyre v. National Ins. Co.* 44 Up. Can. Q. B. 501. 1879.

§ 16. The conditions of a policy of insurance are no part of the consideration. Assured must keep and perform them or the policy is inoperative, but he does not agree to do so. It is not a case of mutual covenants and agreements where the agreement of one side constitutes the consideration for the promise of the other. *Lockwood v. Middlesex Mut. Ins. Co.* 47 Conn. 553. 1880.

See Agent, § 31. Application, 16. Evidence, 7, 8, 26, 87. Mortgagor and Mortgagee, 5. Mutual Company, 38. Proofs of Loss, 60. Questions for Court and Jury, 3. Warranty and Representation, 1.

## CANCELLATION.

§ 1. Condition giving company the option of cancelling the policy is valid and will be enforced. *Irwin v. National Ins. Co.* 2d Disney Cin. Sup. Ct. 68. 1858.

§ 2. The mistake of a person who procures a policy, in ordering or consenting to cancellation, does not release the company. *Marsh v. Northwestern Nat. Ins. Co.* 3 Biss. 351. 1872.

§ 3. Although company has reserved the right to cancel its policy at its option, it cannot do so when danger of fire is imminent. *Home Ins. Co. v. Heck*, 65 Ill. 111. 1872.

§ 4. Under the clause giving right at option of the company to cancel the policy on giving notice and refund-

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ing a ratable proportion of the premium for the unexpired time, it is essential, the premium having been paid, that the notice should be accompanied by payment or tender of the correct return premium to the assured, who must be sought for that purpose. The clause is in the nature of a condition precedent. *Van Valkenburg v. Lenox Fire Ins. Co.* 51 N. Y. 465. 1873. *Hollingsworth v. Germania Ins. Co.* 45 Ga. 294. 1872. *Home Ins. Co. v. Curtis*, 32 Mich. 402. 1875. *White v. Connecticut Ins. Co.* 120 Mass. 330. 1876.

§ 5. An entry by company on its books noting cancellation, made without knowledge or consent of the assured, is not admissible as evidence of the facts recited. *King v. Enterprise Ins. Co.* 45 Ind. 44. 1873.

§ 6. A surrender of policy by assured to company's agent, and the acceptance of it by him, with intention on part of both that it shall be no longer a contract between the assured and the company, is in effect a cancellation. *Train v. Holland Purchase Ins. Co.* 62 N. Y. 598. 1875.

§ 7. When policy has been once surrendered, and surrender accepted by company's agent, the taking of it back cannot revive the contract or make a new one. At least it is for a jury to say what may be the meaning of such an act, assured having a right to take cautionary measures. *Train v. Holland Purchase Ins. Co.* 62 N. Y. 598. 1875.

§ 8. When application is to cancel an old policy and make a new one enlarging existing contract, it does not warrant a cancellation without at the same time complying with the request as an entirety; cancellation cannot be effected without assent or authority of the assured. *Wilkins v. Fire Ins. Co.* 30 Ohio, 317. 1876.

§ 9. By returning policy to company for cancellation assured cancels it on his part, and by retaining the policy two and one-half months without objection to its cancellation the company by its delay and silence consents thereto and is estopped to assert to the contrary. *Walters v. St. Joseph Fire Ins. Co.* 39 Wis. 489. 1876.

§ 10. Under usual provision giving company the right to cancel a policy, it is entirely optional when and for what reason it shall terminate the contract. The motive or sufficiency of the cause for the exercise of this option and election are not to be passed upon by any tribunal, but the will of the company and its election must stand for the reason of its action, and is cause for terminating the risk. *International Life Ins. Co. v. Franklin Fire Ins. Co.* 66 N. Y. 119. 1876.

§ 11. Policy contained clause that "this company shall not be liable by virtue of this policy, or any renewal thereof, unless the premium therefor be actually paid to them or to their duly commissioned agent, within thirty days from date of the policy or renewal." *Held*, that premium not being paid, company might cancel the policy after the thirty days had expired, without notice to the assured. And that a waiver could not be established by evidence of course of defendant in reference to policies previously issued to other parties. *Redfield v. Patterson Ins. Co.* 6 Abb. N. C. 456. 1877. City Court Brooklyn.

§ 12. Cancellation is effected by notice to the insurance broker who obtains the policy and by payment or tender of the return premium to him. *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502. 1877.

§ 13. When a loss is made payable to a third party, such person cannot deal with the policy as his own entirely and agree to its cancellation. So far as any payment to him is concerned he may surrender his claim, but the person who as owner of the property is named as the party insured, if he retains his interest in the property insured is entitled to his indemnity to extent of such interest not exceeding the amount insured. *Marrin v. Stadacona Ins. Co.* 43 Up. Can. Q. B. 556. 1878.

§ 14. Cancellation cannot be effected by surrender and delivery of the policy by a mistake of the party to whom the loss is made payable. *Marrin v. Stadacona Ins. Co.* 43 Up. Can. Q. B. 556. 1878.

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§ 15. When premium has not been paid, notice of cancellation may be given to the party to whom loss is made payable and cancellation is effected at the time of the service of the notice. *Mueller v. Southside Fire Ins. Co.* 87 Pa. 399. 1878.

§ 16. Policy containing usual conditions as to cancellation, and making party procuring the insurance the agent of assured, the insurance may be terminated, the premium not being paid, by notice to a broker who obtained the policy, who accepts such notice and promises to return the policy. *Grace v. Am. Central Ins. Co.* 16 Blatch. 433. 1879.

§ 17. Company may show universal custom in case where it intends to terminate a risk, to give notice of such termination to the broker who procured the policy. *Grace v. Am. Cent. Ins. Co.* 16 Blatch. 433. 1879.

§ 18. Policy providing that it may be terminated upon notice, it is not competent for assured to prove that custom is that such notice does not take effect until a reasonable time has elapsed. *Grace v. Am. Cent. Ins. Co.* 16 Blatch. 433. 1879.

§ 19. Under clause giving right to cancel, the insurance is terminated by giving the notice prescribed by the policy, the premium not being paid. *Grace v. Am. Cent. Ins. Co.* 16 Blatch. 433. 1879.

§ 20. An action lies to reinstate a policy cancelled by the company. *Mansbach v. Metropolitan Life Ins. Co.* 17 Hun, 340. 1879.

§ 21. An interim receipt for insurance stated that it was made subject to all the conditions contained in the printed form of policy then in use. Among such conditions was one providing that policy might be cancelled on giving ten days notice, and by repayment of the unearned portion of the premium. The receipt stated that the property should be held insured for thirty days from date, unless notified to the contrary. *Held*, that in order to terminate the insurance the company was bound to give ten

days notice and pay the return premium. *Grant v. Reliance Fire Ins. Co.* 44 Up. Can. Q. B. 229. 1879.

§ 22. A local agent of a company on a visit to the oil factory insured saw that cotton gins were used. During the same summer the secretary visiting the local agent, the latter complained he was not allowed to take a risk on gins and gin houses, and when told that the company declined all such risks replied, "you have a risk on Ahrenbeck's Cotton Seed Oil Factory, and they are running gins." The secretary replied disclaiming any knowledge of any such risk, and said that if he found a policy providing for such a risk he would cancel it. The secretary testified that the conversation occurred on the street, that it had passed out of his mind, and that he didn't think of it again. He said further, that if any such information had been communicated to him in relation to any fact affecting the validity of the policy, he should feel bound to act upon it in some way, but that he should not if spoken to by one having no interest in the policy. It was claimed that company was bound to cancel the policy after such information. *Held*, that it was error to charge the jury, as a matter of law, that the company, through the information given through its secretary, had notice. *Texas Banking Co. v. Hutchins*, 53 Tex. 61. 1880.

§ 23. Brokers for assured consented that policy might be cancelled and the amount replaced in another company, and that the return premium might be applied in payment of premium due the latter, and policy was delivered to agent for that purpose. The agent indorsed the word "cancelled" upon the policy, made up the return premium, and put both together in his safe, where they were when fire occurred two days later without the agent having replaced the insurance or given any notice of his failure to do so. The assured had no knowledge of the negotiations concerning cancellation. *Held*, waiving question of authority in brokers to cancel, that they had consented only on condition of replacing the insurance, and that as this had not been done, and the unearned premium was not returned, policy was not cancelled, and defendant

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§ 24. Company, to effect cancellation, must make an actual payment of the return premium. If a due-bill or other certificate of indebtedness is given for the same, it is for the jury to determine whether such an instrument is taken as payment or only as evidence of indebtedness. Home Ins. Co. v. Tighe, 12 Rep. 441. 1881. Pa.

See Agent, § 14, 20, 41, 42, 45, 68. Alienation, 14. Consummation of Contract, 10. Increase of Risk, 5, 7, 9, 15, 18. Mortgagor and Mortgagee, 15, 20, 23. Mutual Company, 34, 42, 52, 57, 88, 91, 148, 157. Other Insurance, 10, 33. Premium, 18, 19. Questions for Court and Jury, 14. Reformation, 2. Vacant or Unoccupied, 37.

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## CERTIFICATE.

§ 1. The nearest magistrate who has property destroyed by the same fire is disqualified from signing a certificate. Ganong v. Aetna Ins. Co. 6 Allen N. B. 75. 1864.

§ 2. Assured became insolvent after a loss, and the plaintiff was the official assignee. A certificate stated that the subscriber was not in any way interested, that he had examined the circumstances attending the fire, that he was acquainted with the character of the assured, that he verily believed that the claimant, the assignee, had, as such assignee, sustained loss or damage to the extent of \$2,500; that the said claimant and assignee has, without fraud or evil practice, sustained the said loss and damage. Condition required certificate from the magistrate or notary public most contiguous to the place of the fire, stating that he had examined the circumstances attending it, that he is acquainted with the character and circumstances of the assured or claimant, and that he verily believes that he has, by misfortune and without fraud or evil practice, sustained loss and damage to the amount which the magistrate or

notary public shall certify. The certificate in question in this case was subscribed by the coroner. *Held*, first, that the coroner was a magistrate within the meaning of the condition, but that the certificate as given did not comply with it, as it was, in fact, an evasion of the most essential part of the certificate required by the company. *Kerr v. British America Assurance Co.* 32 Up. Can. Q. B. 569. 1872.

§ 3. Policy required certificate of magistrate most contiguous to place of fire, and "not concerned in the loss as a creditor or otherwise." The magistrate who signed the certificate in question was the landlord of the assured and plaintiff to whom the premises were leased for fifteen years, and at time of the fire the lease had nine years to run. The lease contained covenant that the assured would leave the premises in as good and sufficient repair as to be capable of sawing 2,000 feet of lumber in twelve hours, the lessor agreeing to allow the plaintiff to remove extra machinery that might be erected by the assured more than required to saw such an amount in twelve hours at the expiration of assured's possession, or, otherwise, the lessor covenanted to pay the assured a fair compensation for the same. Court equally divided as to whether or not the magistrate was concerned in the loss within the meaning of the condition. *McRossie v. Provincial Ins. Co.* 34 Up. Can. Q. B. 55. 1873.

§ 4. Condition required that the magistrate shall certify that "he has made diligent inquiry into the facts set forth in the statement of the assured." The certificate was "that I have read his statement of loss, and, from diligent inquiries made by me, I verily believe that he has really and by misfortune, and without fraud or culpable carelessness, sustained loss of over \$3,000." *Held*, insufficient, as it did not certify that he had made any inquiry as to the truth of the facts set forth in the statement, but only as to the amount of the loss, and that there was also a fatal defect in that it did not state that the loss was sustained on the subject-matter insured. *Mason v. Andes Ins. Co.* 23 Up. Can. C. P. 37. 1873.

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§ 5. Signatures purporting to be those of justices of the peace in proofs of loss are admitted as genuine on trial in insurance cases, in the absence of proof to the contrary. *Lafarge v. Liv. Lond. & Globe Ins. Co.* 17 L. C. Jurist, 237. 1873.

§ 6. When policy provides for the production of a magistrate's certificate before loss is payable, it is a condition precedent to right to sustain action. Compliance is not shown by best efforts to procure it. *Johnson v. Phoenix Ins. Co.* 112 Mass. 49. 1873.

§ 7. Condition requiring certificate of nearest magistrate is precedent to loss becoming due and payable. *Home Ins. Co. v. Duke*, 43 Ind. 418. 1873.

§ 8. The nearest magistrate who has property which is burned by the same fire, and who has made complaint against the assured and plaintiff, charging him with the crime of setting the fire, is concerned in the loss, within the meaning of the condition, as he has a claim against the assured on account of the fire, and hence an interest in withholding the certificate. Under such circumstances the next nearest magistrate or officer is the proper party to give the certificate. *Wright v. Hartford Fire Ins. Co.* 36 Wis. 522. 1875.

§ 9. Upon an issue as to whether certificate has been furnished within a reasonable time, if the facts are undisputed, it should be determined by the court; a delay of eight months in this case *Held*, not to be unreasonable. *Cammell v. Beaver & Toronto Fire Ins. Co.* 39 Up. Can. Q. B. 1. 1876.

§ 10. Policy required that persons sustaining loss by fire should forthwith give notice as soon after as possible, and deliver a particular account of the loss, stating, &c. They shall also produce a certificate under the hand and seal of a magistrate, &c. *Held*, that assured was not thereby required to furnish a certificate as soon as possible, but, that if he did so within a reasonable time it was sufficient. *Cammell v. Beaver & Toronto Fire Ins. Co.* 39 Up. Can. Q. B. 1. 1876.

§ 11. Condition requiring magistrate's certificate is precedent to assured's right of recovery. *Cammell v. Beaver & Toronto Fire Ins. Co.* 39 Up. Can. Q. B. 1. 1876.

§ 12. Where there are several officers residing in the same immediate neighborhood, all of whom are competent to make the certificate, that of either of them will be a sufficient compliance with the condition, and a distance of a few yards more or less, from place of fire, will not be regarded as a matter of any importance. *American Cent. Ins. Co. v. Rothschild*, 82 Ill. 166. 1876. *s. p. Williams v. Niagara Ins. Co.* 50 Iowa, 561. 1879.

§ 13. Compliance with condition in regard to furnishing certificate by the nearest magistrate, is precedent to a right to recover. Such fact must be proved upon the trial, and will not be inferred from evidence merely that the certifying justice resided in the same district that the assured did. *Herkins v. Provincial Ins. Co.* 3 Russel & C. N. S. 176. 1878.

§ 14. Agent having previously insisted upon a compliance with all the conditions of the policy, his silence upon receiving a letter forwarding certificate from two magistrates and explaining why a certificate from the two nearest was not produced, is no evidence of waiver. *O'Connor v. Commercial Union Ins. Co.* 3 Russel & C. N. S. 119. 1878.

§ 15. The statement of the amount of the loss in a certificate by a magistrate or notary, is precedent to the right to recover. *Borden v. Provincial Ins. Co.* 2 Pugsley & B. N. B. 381. 1878.

§ 16. If notary is interested or related to assured it is matter of defense and need not be alleged or proved by plaintiff, but must be by defendant. *Phoenix Ins. Co. v. Perkey*, 92 Ill. 164. 1879. *Phoenix Ins. Co. v. Duff*, 9 Ins. L. J. 23. 1879. Ill.

§ 17. When certificate of loss was received in March, and no objection was made until after suit brought in August following, *Held*, to be sufficient evidence of an ac-

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§ 18. Policy provided that proofs should be furnished within 30 days, and that assured should also produce a certificate under the hand and seal of the chief of the Fire Department, &c.; *Held*, that the limitation of the 30 days does not apply to the certificate which must be furnished within a reasonable time. *Badger v. Glen's Falls Ins. Co.* 49 Wis. 389. 1880.

§ 19. The phrase "not concerned in the loss as a creditor," cannot disqualify every magistrate who may chance to be a creditor, even to a small amount, of the assured. The phrase should be interpreted as requiring certificate of a magistrate who is not concerned in the loss by reason of having an interest in the property or in the policy as security. *Dolliver v. St. Joseph Fire Ins. Co.* 10 Ins. L. J. 380. 1881. Mass.

See Evidence, § 21. Foreign Company, 14. Waiver, 3.

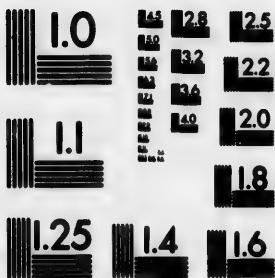
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## COLLISION.

§ 1. Company is liable for loss or damage by fire occasioned by collision or any cause not expressly excepted in the contract. *Germania Ins. Co. v. Sherlock*, 25 Ohio, 33. 1874.

§ 2. Policy contained condition that "no loss is to be paid in case of collision, except fire ensue, and then only for the loss and damage by fire. And that no loss is to be paid arising from petroleum or other explosive oils," and covered property in an express car attached to a train on the Hudson River R. R., on its way to Albany from New York. The train came into collision with an oil car which, by the breaking of its axle, had been thrown from the other track. Immediately the oil ignited and

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burst into flames which destroyed most of the train, including property insured. *Held*, that the loss was not covered by the policy. *Imperial Ins. Co. v. Express Co.* 5 Otto, 227. 1877.

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### CONCEALMENT.

Where the circumstances do not themselves show a fraudulent intention, it is error to take a question of concealment from the jury. *People v. Liv. Lond. & G. Ins. Co.* 2 T. & C. (N. Y. Sup.) 268. 1873.

§ 2. The presence of benzine in a contiguous building is a fact material to risk, and if not disclosed in the application, it is fatal to the insurance without reference to the fact whether the omission was by design, ignorance or inadvertence. *McFarland v. Peabody Ins. Co.* 6 W. Va. 425. 1873.

§ 3. An omission to state a small mortgage in an application for an insurance existing upon the property, but which the vendor of the applicant is bound to remove by the terms of the contract of purchase, is not material to the risk. *American Ins. Co. v. Gilbert*, 27 Mich. 429. 1873.

§ 4. The fact that assured has previously applied to another agent of the same company for insurance and been refused and omits to state such fact when he obtains policy in suit from another agent, is not such a concealment of a material fact as to render it void. *Goodwin v. Lancashire Fire Ins. Co.* 18 L. C. Jurist, 1. 1873. Reversing 16 L. C. Jurist, 298.

§ 5. In the absence of any inquiry or provision in the policy, concealment of litigation will not affect the insurance. *Cheek v. Columbia Fire Ins. Co.* 4 Ins. L. J. 99. 1874. Tenn.

§ 6. Under General Statutes, ch. 157, sec. 2, assured's omission to state the facts in regard to his title and interest does not avoid the policy unless such omission is intentional and fraudulent. *Tuck v. Ins. Co.* 56 N. H. 326. 1876.

§ 7. An omission to state in an application that which is *known* to company's agent, cannot under ordinary circumstances be such a concealment as to avoid the insurance. *Benson v. Ottawa Ins. Co.* 42 Up. Can. Q. B. 282. 1877.

§ 8. There can be no material concealment in absence of inquiry or express stipulation on the subject, in failing to state that property insured is in the custody of lessee of assured, policy accurately describing location of building containing it. *Little v. Phoenix Ins. Co.* 123 Mass. 380. 1877.

§ 9. Concealment or omission to state the fact of a contingent right of dower in assured's vendor does not avoid the policy unless shown to increase the risk; if such an omission is fraudulent, it would avoid the insurance, but such a question is properly submitted to the jury. *Virginia Fire Ins. Co. v. Kloeber*, 31 Grat. 749. 1879.

§ 10. Policy provided that it should be void if there was any omission to make known a material fact. There was a three hundred dollar mortgage on the property undisclosed at the time of the obtaining of the policy. *Held*, that the existence of an incumbrance is material unless so trifling as to be manifestly unimportant, whether the conditions are or are not treated as warranties. *Aetna Ins. Co. v. Reah*, 40 Mich. 241. 1879.

§ 11. *Semble* that a diagram cannot be regarded as important or material on an issue of concealment when there are no directions in the application specifying that it must delineate surrounding property for a certain distance. *Armenia Ins. Co. v. Paul*, 91 Pa. 520. 1879.

§ 12. A threat to burn assured's property made several months prior to the fire, during the excitement attend-

ing an election, which was not stated by the assured at the time of the obtaining of the policy, is not such a concealment of a material fact as will avoid the insurance. Kelly v. Hochelaga Mut. Fire Ins. Co. 24 L. C. Jurist, 298. 1880.

See Application, § 6. Consummation of Contract, 6. Entirety and Divisibility of Policy, 8. Estoppel, 24. Pleading and Practice, 29. Title, 19, 30, 85, 50. Waiver, 18. Warranty and Representation, 3, 16, 39, 84, 89.

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## CONSTRUCTION.

§ 1. *Per Church, Ch. J.* In case of ambiguity knowledge of facts by company is potent upon the question of intention and construction. Reynolds v. Commerce Fire Ins. Co. 47 N. Y. 606. 1872. And see Ludwig v. Jersey City Ins. Co. 48 N. Y. 379. 1872.

§ 2. Equivocal language, specially such as is calculated to mislead, shall be construed most strongly against the company using the language and issuing the policy. Reynolds v. Commerce Fire Ins. Co. 47 N. Y. 597. 1872.

§ 3. When policy contains plain and unambiguous language, courts must look to it alone to find intention and meaning of the parties, and parol proof is inadmissible. Hough v. People's Ins. Co. 36 Md. 398. 1872.

§ 4. Conditions working a forfeiture must be strictly construed. Morse v. Buffalo Fire Ins. Co. 30 Wis. 534. 1872. Westchester Fire Ins. Co. v. Earl, 33 Mich. 143. 1876. Aurora Fire Ins. Co. v. Kranich, 36 Mich. 289. 1877.

§ 5. Rights of the assured and liability of the companies are fixed at the time of the loss, provided the requisite notices and proofs are furnished. Imperial Ins. Co. v. Murray, 73 Pa. 13. 1873.

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§ 6. *Per Allen, J.* Contracts of insurance should be construed so as to give effect to intent of parties as indicated by language employed. They do not differ in any respect from other written instruments, but are interpreted by the same rules. Insurers and insured may agree upon terms of contract and make its validity or continuance depend upon any terms and conditions lawful in themselves, which they may deem reasonable and proper; and whether reasonable or not is for them, not for the courts, to determine. *Savage v. Howard Ins. Co.* 52 N. Y. 504. 1873.

§ 7. Conditions should not be extended by implication so as to embrace cases not clearly or reasonably within the very words, as such words are ordinarily used and understood. *Rann v. Home Ins. Co.* 59 N. Y. 387. 1874.

§ 8. Policy read, "the said buildings herein insured are more than 'oix' feet from any other buildings," &c. The case turned upon the question whether the word italicised was "six," and hence sensible, or "oix," and therefore without meaning; if the former, it was against the right of the plaintiff to recover; if the latter, it favored recovery. Trial court submitted the question to the jury to find whether the word was written "six" or "oix," and received their verdict for the plaintiff. Held, error, that the court should have decided the point as a matter of construction and that inspection showed plainly that the word was "six" and not "oix." *Lapeer Ins. Association v. Doyle*, 30 Mich. 159. 1874.

§ 9. A contract of insurance contains two classes of stipulations: first, those relating to matters and things prior to the loss and which define and determine the limits of the risk; and, second, those which relate to matters and things occurring after a loss and having for their object to determine the mode in which the loss is to be established, adjusted and recovered. As to the former, there is less readiness to find circumstances of waiver than in case of the latter. *Hinman v. Hartford Fire Ins. Co.* 36 Wis. 159. 1874.

§ 10. An insurance contract is to be construed like other contracts with a view to arrive at the intent of the parties. The rule that it shall be construed most strongly against the company can be resorted to only when, after using such helps as are proper to arrive at the intent of the parties, some of the language used, or some phrase, is of doubtful import. *Foot v. Aetna Life Ins. Co.* 61 N. Y. 571. 1875.

§ 11. Paragraphs and clauses of policy should not be construed so as to make them conflict with each other, if such a construction can be avoided. They should be construed so as to make them harmonize, if such a construction is possible; and so as to give to each and all their terms full force and operation. The intention of the parties is the end and object in construction of all instruments. *Cobb v. Ins. Co. N. A.* 17 Kans. 492. 1877.

§ 12. Forfeitures are not encouraged in law. When forfeitures of insurance policies rest on substantial grounds corresponding to the risk, courts will uphold them, but when they rest on purely technical grounds not going to the risk, the contract of insurance is to be upheld if it can be without violation of any principle of law. *Appleton Iron Co. v. British American Assurance Co.* 46 Wis. 23. 1879.

§ 13. The words of an insurance contract need not be taken in sense in which they may have been understood by underwriters. They must be taken in their ordinary sense, as commonly used and understood; and if the sense in which they were used is uncertain, they should be construed most favorably to the assured. *Herrman v. Merchants' Ins. Co.* 81 N. Y. 184. 1880.

§ 14. Insurance contract should be enforced according to its true spirit, but its meaning must be obvious, and require no straining in order to provoke a forfeiture. *Woodruff v. Imperial Fire Ins. Co.* 83 N. Y. 133. 1880.

§ 15. A total loss does not mean an absolute extinction. The question is not whether all the parts and materials composing a building are absolutely or physi-

ally destroyed, but whether after the fire the thing insured still exists as a building. *Williams v. Hartford Ins. Co.* 54 Cal. 442. 1880.

See Damages, § 21. Definitions. Evidence, 7, 16. Questions for Court and Jury, 2, 5, 7, 16. Risk, 10, 15, 16, 21. Storing and Keeping, 2, 3, 18, 20, 21, 28. Usage and Custom, 1. Use and Occupation, 8, 9. Warranty and Representation, 24. What Property Covered, 8.

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## CONSUMMATION OF CONTRACT.

§ 1. Policy is issued when forwarded by agent to broker for delivery. *McLachlan v. Aetna Ins. Co.* 4 Allen, N. B. 173. 1858.

§ 2. The assured held policy of the Lond. and Liv. Ins. Co. for one year, expiring Oct. 2d, 1866. Just before the expiration of the insurance he paid the local agent premium for renewal and received a receipt. The general agent of the company declined to renew the risk and paid amount of the premium to the defendant which issued a policy on the same risk dated October 16th, 1866, but making the term for one year from October 2d, 1866. The property was destroyed on October 13th, before issue of the policy. *Held*, that contract of the defendant took effect from the second of October, and that plaintiff was entitled to recover. *Giffard v. Queen Ins. Co.* 1 Hannay, N. B. 432. 1869.

§ 3. Policy was applied for and dated the 18th, but was not delivered nor premium paid until the 22d day of the month. *Held*, that policy must be considered as commencing on the 18th, the day of its date. *Hubbard v. Hartford Fire Ins. Co.* 33 Iowa, 325. 1871.

§ 4. Assured in good faith, having no knowledge of the fact, applied for insurance upon property which had been lost two days before, and there was an entry made in an open policy covering the property "lost or not lost." *Held*, that such entry made the insurance operative, and

it covered the property whether lost or not at time of the indorsement. *Marx v. National Ins. Co.* 25 La. Ann. 39. 1873.

§ 5. When agent accepts policy sent to him by company, and charges himself with the premium, the contract of insurance is consummated, and company is liable. *Lungstrass v. German Ins. Co.* 57 Mo. 107. 1874.

§ 6. Plaintiff made his application for insurance on the 10th day of January, 1871. Application was accepted and policy made out and signed the same day, being in force from noon of that day. The policy remained in the hands of the company until the 27th of March next ensuing. On the 26th of March the property was destroyed by the fire, and on the following day the plaintiff went to the office of the company, paid the premium and obtained the policy. He did not disclose the fact that property was burned when he received the policy, and the defendant was ignorant of that fact. *Held*, that when defendant accepted the premium and delivered the policy the agreement to insure was complete and ratified as of the 10th day of January, 1871. The plaintiff had the right to rely on the agreement, and was not bound to voluntarily inform the company of the fire. *Baldwin v. Chouteau Ins. Co.* 56 Mo. 151. 1874.

§ 7. Insurance was applied for by agent of the assured, who, upon receipt of the policy from a messenger from office of the local agent of the company, sent back a memorandum that he would look into the standing of the company, and after he was satisfied about it he would settle. He said, also, that he doubted the standing of the company. In half an hour after he received the policy he delivered it over to the assured, who knew nothing of what had transpired between him and the company's agent. This was on the 13th of November, 1872. A week later the mill covered by the policy was totally destroyed by fire. The policy provided that it should not be liable until the premium was paid, and it contained an acknowledgment in usual form of its receipt. After the fire both the assured and his agent tendered the premium

to the company's agent, which was declined. *Held*, that there was no acceptance of the policy prior to the fire sufficient to make a valid contract of the insurance, and that the condition for prepayment of the premium remained in force, and the company was entitled to notice of acceptance and prepayment of the premium before the contract of insurance was complete. And where there has been no waiver, as in this case, policy cannot be accepted and the premium tendered after a fire. *Millville Ins. Co. v. Collerd*, 9 Vroom, N. J. L. R. 480. 1875.

§ 8. If assured leaves policy in the hands of the agents of the company, subject to the order and control of a third person, it is a sufficient delivery, although such third party has not actually called for or received it. *Home Ins. Co. v. Curtis*, 32 Mich. 402. 1875.

§ 9. The acceptance by assured of rate demanded by a general agent through a local agent having no authority to issue policy, other particulars being satisfactory to the general agent, binds the company from the time of such acceptance. *Eames v. Home Ins. Co.* 4 Otto, 621. 1876.

§ 10. Application was made to agents who had authority to issue policies of the Revere Company, and to temporarily bind the defendant. Without knowledge of the assured they wrote a policy in the Revere, and notified the home office. This was on November 1st, 1875. On the following day the Revere declined the risk, of which notice was received by the agents by letter about six o'clock in the evening. They immediately decided to place the risk at once in defendant, and memorandum was duly made and entered to that effect. The Revere policy was not then delivered. Fire occurred between 11 and 12 o'clock, night of November 2d. The Revere policy was subsequently delivered to assured by clerk of company's agents in their absence. It appeared that by an arrangement with the Revere, that plaintiff only claimed to hold one of the companies. The Revere policy contained usual clause as to cancellation on notice, &c. *Held*, that the Revere policy became a binding contract upon its execution, and that it could not be termi-

nated without notice to the assured, and that it was therefore liable for the loss, and defendant was discharged from liability, because its contract was to take effect only on termination of the Revere insurance. *Massasoit Steam Mills v. Western Assur. Co.* 125 Mass. 110. 1878.

§ 11. An insurance broker was in the habit of obtaining insurance in defendant, for which one Swinson was the agent. The course of business was for the former to accept the risk, take the premium, and subsequently obtain a policy from the latter as of date when risk was accepted. On 3d of November, 1876, plaintiff obtained insurance on his property from the broker, and paid him the premium. Same day latter sent risk to Swinson. On the 6th Swinson sent policy to broker, who delivered it to plaintiff. Property was destroyed by fire on the 4th. All parties were ignorant of this until after policy was delivered. *Held*, that the insurance took effect on 3d of November, by ratification of defendant's agent. *Collins v. Phoenix Ins. Co.* 14 Hun, 534. 1878.

§ 12. Company was incorporated 24th of July, 1876, and, on the 7th of August following, assured made application for insurance upon his house, subject to approval of board of directors. This was delivered to one of the directors on the 9th of August, and on the 12th he delivered it to the secretary or laid it on his desk. A quorum of the directors was not present. On the 19th of same month a meeting of the board was held for transaction of *special business*, and no action was taken at that time upon the application. On the 30th of August building was destroyed by fire. On 25th of September, being the first regular meeting of the executive committee, the application was rejected, and this action was approved by the board. *Held*, that there was no contract of insurance. *Harp v. Grangers' Mut. Ins. Co.* 49 Md. 307. 1878.

§ 13. Agent to take applications cannot bind company by any contract of insurance. To bind company there must be an acceptance of the proposition contained in the application. *Walker v. Farmers' Ins. Co.* 51 Iowa, 679. 1879.

§ 14. A policy of reinsurance was to cover such ships or vessels against loss by fire, to extent of £50,000, as might be declared at and from certain ports therein mentioned. It provided that it was to be supplemented by further policies on like terms, should the amount not prove sufficient for the year's transactions. Term, one year from October 1, 1876. Declarations being in excess of the policy on the 9th of July following, defendant issued a second policy for same amount and same terms. On the 7th of June plaintiff had insured a ship called the "Hampden," which was destroyed on the 18th of September. On the 25th of October a third policy was issued by defendant, same as pending. On the 2d of November plaintiffs declared the Hampden, and claimed a total loss. At time third policy was effected plaintiffs knew that the vessel was lost. It was admitted that the Hampden did not come under the first two policies, which were by previous risks exhausted, when plaintiffs insured it, but must come under the third policy, if any. It was admitted, also, that there was a usage to effect that, in case of open policies on ships to be declared, the policy attaches to the goods as soon as and in the order in which they are supplied, in which order the assured is bound to declare them, and in case of mistake as to the order of shipment, assured may rectify the declaration, even after a loss. *Held*, that defendant was bound by such usage, that plaintiff could rectify his declarations, and that defendant was liable. Imperial Marine Ins. Co. v. Fire Ins. Co. 4 L. R. C. P. Div. 166. 1879.

See Agent, § 23. By Laws and Conditions, 7. Estoppel, 29. Mutual Company, 89, 127. Parol Contract, 82. Place of Making Contract, 8. Reformation, 17. Renewal, 6.

## CONTRIBUTION.

§ 1. When policy provides that company shall be liable for only two-thirds of the cash value, its liability under the contribution clause is limited by such amount. *Lycoming Mut. Ins. Co. v. Stocklomn*, 3 Grant Cas. 207. 1856.

§ 2. Contribution clause has no application where the loss exceeds the total amount of insurance. *Phillips v. Perry County Ins. Co.* 7 Phil. Rep. 673. 1870.

§ 3. Plaintiff obtained policy in suit for \$3,000 on his stock contained in a specified building, other insurance being permitted, and policy containing the usual contribution or apportionment clause. At time of fire plaintiff held fourteen other policies, issued by various companies, to the amount of \$47,500, covering *same* property, and a large amount of *other* property. All the property insured and covered by the fifteen policies was destroyed by fire. Value of the entire property, \$88,788 83. Value of property covered by defendants' policy, \$16,305 89. Trial court directed verdict for plaintiff for full amount of his policy, \$3,000. *Held*, that there was a total loss of the whole subject insured by all the policies, and that the other insurance was not such as to require any apportionment. *Ogden v. East River Ins. Co.* 50 N. Y. 388. 1872.

§ 4. Where plaintiff obtained a floating policy upon merchandise in any of the warehouses in New York, Brooklyn and Jersey City, which contained an average clause to the effect that if the merchandise should, at the time of any fire, be insured by any specific insurance, then "this policy shall not extend to cover the same, excepting only as far as relates to any excess of value beyond the amount of such specific insurance, which said excess is declared to be under the protection of this policy," and fire occurred in warehouse in which there was merchandise to amount of \$386,026, and covered by specific insurance to amount of \$324,000. Amount of the loss

\$274,192 46. *Held*, policy attached to and protected only that portion of the value which was in excess of the specific insurance, and that the whole loss was intended to be thrown upon the specific insurance, unless it exceeded the amount of them, and then the excess was intended to fall upon the floating policy. *Fairchild v. Liverpool & L. Ins. Co.* 51 N. Y. 65. 1872.

§ 5. Policies were taken out by the Baltimore Warehouse Company in its name upon cotton stored by factor, who had obtained other insurance covering the same property in other companies in his name, loss being made payable to the Warehouse Company to secure advances. *Held*, double policies, and the companies issuing them bound to contribute their respective proportion of the loss. *Hough v. People's Ins. Co.* 36 Md. 398. 1872. *s. p.* *Home Ins. Co. v. Baltimore Warehouse Co.* 3 Otto, 527. 1876. *Robbins v. Firemen's Fund Ins. Co.* 16 Blatch. 122. 1879.

§ 6. Where a specific item of property is insured by one policy, and the same is covered by another policy, which also includes other property, the latter policy cannot be thrown wholly out of view, but must constitute other insurance within the meaning of the apportionment clause. *Ogden v. East River Ins. Co.* 50 N. Y. 388. 1872. *Overruling, Howard Ins. Co. v. Scribner*, 5 Hill, 298.

§ 7. Property specifically covered by a certain policy, and not in building when a prior policy was obtained, insuring same kind or class of property generally, cannot be claimed to be covered by the latter so as to entitle the former to an apportionment of the loss. *Mauger v. Holyoke Mut. Fire Ins. Co.* 1 Holmes, 287. 1873.

§ 8. Where policy is issued by four companies in name of "Underwriters' Agency," but provides that each shall be liable for one-fourth of the loss "in the same manner and not otherwise, as if each had issued its separate policy for such proportionate amount," the contract is joint, and a jury (under Georgia Code) may by their verdict apportion the loss to each as provided by the policy. *Sutherlin v. Underwriters' Agency*, 53 Ga. 442. 1874.

§ 9. Policy contained usual apportionment clause in case of other insurance. Plaintiff had a policy in another company, which policy contained clause making it void in event of other insurance being obtained without its consent. No notice or consent was given in respect to defendant's policy. Upon notice of loss to other company the president declared its policy to be void on account of other insurance. No proofs of loss were served, and no measures taken to collect. *Held*, plaintiff was not bound to continue the other insurance, that it was competent for him to cancel it without defendant's assent, and as by its terms it became wholly "void," there was no obligation to make an attempt to enforce it. That there being no other insurance in force, defendant was not entitled to an apportionment and was liable for full amount. *Hand v. Williamsburg City Fire Ins. Co.* 57 N. Y. 41. 1874.

§ 10. Responsibility to contribute to a loss begins when the insurance has been effected and terminates when the policy expires. *Planters' Ins. Co. v. Comfort*, 50 Miss. 662. 1874.

§ 11. Defendant issued 3 policies, \$500 each, on live stock, each containing the usual clause providing for an apportionment or contribution in case of loss. A fire occurred whereby two steers of the value of \$336, and one bull of the value of \$2,000, were destroyed. At the time of the loss the assured had other insurance in the *North Missouri Ins. Co.*, for the sum of \$1,666 67 on live stock, no one animal to be valued at more than \$500. He had also another policy in the *Continental Ins. Co.*, for the same amount on live stock, not to exceed \$500 on any one. *Held*, that the loss should be apportioned as follows:

	On Steers.	On Bull.	Total.
Continental.....	\$115 83	\$500 00	\$615 83
North Missouri.....	115 83	172 42	288 25
Madison Mutual.....	104 34	1,327 58	1,431 92
Totals .....	\$336 00	\$2,000 00	\$2,336 00

And that defendant was therefore liable for the sum of \$1,431 92. *Sherman v. Madison Mutual Ins. Co.* 39 Wis. 104. 1875.

§ 12. Building was occupied by assured as shoe dealers and manufacturers. The first and second floors were used as salesrooms, and the third and fourth as a factory. Insurance had been effected as follows: upon the stock in the whole building, including the third and fourth floors,

Royal Ins. Co.....	\$10,000
Lond., Liv. and Globe.....	5,000
Franklin.....	5,000

Total on stock in the whole building..... \$20,000

Upon stock on the third and fourth floors,

Royal Ins. Co.....	8,000
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Upon machinery, &c., on the third and fourth floors,

Royal Ins. Co.....	2,000
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There was a fire by which the loss was ascertained as follows:

Loss on stock in the salesrooms.....	\$29,986 76
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On the third and fourth floors.....	8,840 73
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On machinery, &c., on third and fourth floors,	2,500 00
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The excess of loss on stock in the salesrooms over the total amount insured by the general policies was.....	9,986 76
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The excess of loss on stock on third and fourth floors exceeded the amount of the special policy...	\$840 73
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The loss on the machinery exceeded the amount of the insurance by	500 00
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The policy of the Royal Ins. Co. contained the usual contribution clause.	
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The adjustment of the loss under the specific policy for \$8,000 on stock on third and fourth floors was, upon the principle claimed by the assured to be correct, as follows:

The loss on stock on third and fourth floors was..... \$8,840 73

Royal.....	\$10,000 gen. pays,	\$8,157 40
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Lond., Liv. & Globe..	5,000	"	1,578 70
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Franklin.....	5,000	"	1,578 70
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Royal .....	8,000 specific "	2,525 93
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Royal paid \$2,525 93 to the assured and submitted the question of its liability for the balance of its specific policy to the court. *Held*, that the entire loss exceeded the entire insurance of all the policies general and special, and that the general and special policies covered in fact different subjects, and that the loss under each was more

than sufficient to exhaust the entire amount. A rule of average, which would exempt the general policies from a portion of their peculiar loss below in order to carry it to the relief of the special policy above and thus to exonerate each from a portion of a total loss of different subjects, would directly contradict the spirit and intent of the contract. *Held*, therefore, that the assured was entitled to the balance of the \$8,000. Royal Ins. Co. v. Roedel, 78 Pa. 19. 1875.

§ 13. The liability of company under a clause providing that it shall not be responsible for "any greater portion of the loss or damage sustained than the amount hereby insured shall have to the whole amount of insurance," is several, not joint; although assured may have received from another company more than three-fourths of the value to which extent of the insurance is limited, the other is still liable for its proportion of the value in full according to its contract. Liability of company in this particular must be determined by state of facts at time of loss. Bardwell v. Conway Ins. Co. 118 Mass. 465. 1875.

§ 14. Policy provided that the assured should be entitled to recover in case of loss only the proportion which the sum insured bore to the whole amount of all the insurances which were on the property. There were three policies, two besides that of the defendant. In one issued by the *Aetna*, the loss was made payable to a mortgagee. The jury were directed to assess the damages on the basis that there was but one other policy leaving out of the account entirely the policy in the *Aetna* company. *Held*, correct, that the policy in the *Aetna* was upon a distinct and separate interest in the property from that upon which the defendant's policy was written; that insurance was upon the interest of the mortgagees, while the one in suit was on the equity of redemption. The jury were properly directed to apportion the loss between the two companies which had insurances on the same interest according to the amount of the respective policies, taking as a basis not the whole value of the property, but the value of the plaintiff's insurable interest, that is, of his interest as owner of the equity of redemption. Tuck v. Ins. Co. 56 N. H. 326. 1876.

§ 15. Other insurance to entitle company to apportionment of loss must be upon same interest. Insurance by a mortgagee upon *his interest* is not such other insurance. Adams v. Greenwich Ins. Co. 9 Hun, 45. 1876. Aff'd 70 N. Y. 166. S. P. Johnson v. N. B. and M. Ins. Co. 1 Holmes, 117. 1872.

§ 16. When policy is obtained by wharfinger upon goods his own or held by him in trust or on commission and for which he is responsible, and there is another policy obtained by the actual owners of goods stored with him upon their interests exclusively, it is not a case of other or double insurance requiring an apportionment of loss. N. B. & Mercantile Ins. Co. v. Liv., Lond. & Globe Ins. Co. 5 L. R. Ch. Div. 569. 1877.

§ 17. Policy was made payable to a mortgagee, and contained provision that "no sale or transfer of the property hereby insured shall vitiate the right of the mortgagee to recover in case of loss." Assured subsequently made a second mortgage which was foreclosed, and the purchaser obtained a policy insuring his interest. Defendant claimed that it was liable for only its proportion of the loss according to contribution clause in its policy. Held, that the company, by its special contract with the plaintiff, had agreed that its right to recover should not be affected by any of the natural consequences or incidents of a sale and transfer, and that the loss being less than the debt there could be no apportionment. City Five Cent Sav. Bank v. Penn Ins. Co. 122 Mass. 165. 1877.

§ 18. The provision in a policy for contribution relates to existing insurance at the time of the fire, and cannot be construed so as to impose any obligation on the part of the insured to keep in force policies held by him at the time the one in suit was obtained. Quarrier v. Peabody Ins. Co. 10 W. Va. 507. 1877.

§ 19. Policy was issued in the firm name of Verdier & Brown, for one year from the 15th of May, 1874. It contained the usual clause providing for an apportionment

of the loss. On the first of May, 1873, John Verdier, then alone in business, had taken out a policy in another company for one year upon the same property. It appeared in evidence that Mr. Verdier had taken Mr. Brown into partnership with him about a month before the fire. It was then agreed between them that all fire policies should be transferred to the firm; that the policy in suit was transferred accordingly, but that the other was not assigned, for the reason that on seeking for the agent, in order to accomplish that object, it was found that he was not at home. It also appeared that adjustment of the loss was begun before five days after the fire, and was concluded about two weeks after, and that the agents of the defendant and of the Underwriters' Association and also of the other company participated in it. After the loss Mr. Verdier assigned the policy of the other company to the Hanover Company of New York, being one of the Underwriters' Association, and received therefor the amount he claimed. The other policy expired on the first of May, and the premium for renewal was not paid until the day of the fire, and just after that event, which happened the 4th of June, 1874. *Held*, that the joining of the other company in the adjustment, and the want of objection on their part to the want of a formal assignment, were agreeing circumstances with the others to show that such other company and the assured were in actual concurrence, that the policy was a living one existing in favor of the firm and as an insurance upon their stock, and therefore that plaintiff in error was entitled to an apportionment of the loss according to the clause in its policy; *Liv., Lond. & Globe Ins. Co. v. Verdier*, 33 Mich. 138, 1876; and this result is not affected by the change of interest, policy in suit stipulating that in adjusting a loss existing policies should be taken into account, even though forfeited. s. c. 35 Mich. 395. 1877.

§ 20. Contribution or apportionment clause enforced.  
*Harrington v. Fitchburg Ins. Co.* 124 Mass. 126. 1878.

See Description. Mortgagor and Mortgagee, § 21, 30, 33, 43. Mutual Company, 118.

## COVENANT TO INSURE.

§ 1. A building association authorized to effect insurance, having agreed to do so, is liable for a breach of the agreement. But a particular company being deemed to have been selected under right reserved, although contract was not consummated, it was *Held*, that the association was liable to the extent that a policy in that company would have afforded indemnity, and that the company being insolvent, whatever dividend it might be able to pay would be the criterion for ascertaining the damages. Chicago Build. Soc. v. Crowell, 65 Ill. 453. 1872.

See Goods in Trust, § 4.

## DAMAGES.

§ 1. Referee or jury are not bound to accept either of two amounts established by evidence of the value of goods destroyed, but may find a sum between the two. Unger v. People's Ins. Co. 4 Daly, 96. 1871.

§ 2. The amount paid by an insurance company to the owner and assured, cannot be availed of as a defense or in mitigation of damages, in a suit brought by the assured against party where negligence caused the loss. Harding v. Town of Townshend, 1 Ins. L. J. 685. 1871. Vt.

§ 3. High wines insured were worth forty-nine cents per gallon without payment of government tax, and ninety-nine cents with the tax paid. When burned they were stored in a bonded warehouse. The tax had not been paid. *Held*, that assured's liability to the tax ceased with destruction of the property, and that company was only liable for the spirits at value of forty-nine cents per gallon. Security Ins. Co. v. Farrell, 2 Ins. L. J. 302. 1872. Ill.

§ 4. When policy limits loss to two-thirds of the value, it is error to allow interest upon any sum in excess. Rockford Ins. Co. v. Nelson, 65 Ill. 415. 1872.

§ 5. Money borrowed by assured from company and claim due under policy held by former, constitute a case of mutual debt and credit. Although money loaned is not due at time bill is filed, it is competent for the assured, company being insolvent, to call on a court of equity to allow the set-off. Drake v. Rollo, 2 Ins. L. J. 935. 1872. U. S. Circuit, Ill. But treasurer of company cannot be allowed to set-off debt due from him on account of his subscription to the stock against his losses under his policies. Scammon v. Kimball, 2 Ins. L. J. 775. 1873. U. S. Circuit, Ill.

§ 6. The sum insured is the extent of liability, not the measure of assured's claim. Ill. Mut. Fire Ins. Co. v. Andes Ins. Co. 67 Ill. 362. 1873.

§ 7. Interest begins to run sixty days after the furnishing of proofs, from time loss is payable. Field v. Ins. Co. N. A. 6 Biss. 121. 1874. s. p. Knickerbocker Ins. Co. v. Gould, 80 Ill. 388. 1875.

§ 8. The cash value of building destroyed is the value as it stood day of destruction, as compared with a new building of same kind and dimensions. If building was old and dilapidated from use and decay, its value in that condition is what assured is entitled to recover. Assured is not entitled to original cost of building, or to a sum sufficient to erect a new one; nor is it proper to fix value by ascertaining difference in value of lot with building upon it, and its value with building destroyed. Etna Ins. Co. v. Johnson, 11 Bush (Ky.), 587. 1875.

§ 9. The market value of goods insured at the time and place of the fire is that which assured loses by the fire and is the measure of damage. Fowler v. Old North State Ins. Co. 74 N. C. 89. 1876.

§ 10. In determining amount of loss or damage itemized valuation should be considered by trial court in

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preference to gross. *Smith v. Exchange Fire Ins. Co.* 8 *Jones & Sp.* 492. 1876.

§ 11. A company's liability to pay the full value of building insured cannot be effected or reduced by the fact that the building has been valued by a commission appointed for the purpose of street improvement, the assured being under legal obligations to accept the same and the building to be torn down. *Collingridge v. Royal Exchange Assurance Co.* L. R. 3 Q. B. Div. 173. 1877.

§ 12. The rental of a building at time of fire may be given in evidence as bearing upon the question of loss. *Atlantic Ins. Co. v. Manning*, 3 Col. 224. 1877.

§ 13. Property insured was occupied as a homestead. *Held*, that the destruction by fire actually damaged the assured to the amount it would cost to restore the property to the condition it was in before the fire. *Germania Fire Ins. Co. v. Casteel*, 7 Ins. L. J. 253. 1877. Ill.

§ 14. Where policy provides that loss shall be paid within sixty days after adjustment, and the company have used reasonable efforts to arrive at an adjustment, it is error to allow interest from sixty days after the loss. Interest can be allowed only from judicial demand. *Gettwerth v. Teutonia Ins. Co.* 29 La. Ann. 30. 1877.

§ 15. Insurance is but a contract of indemnity ; the indemnity can go no farther than the interest of the party who is indemnified, and if that interest is partial and not entire, the indemnity does not cover a value incident to ownership. *Porter v. Aetna Ins. Co.* 6 Ins. L. J. 928. 1877. U. S. Circuit, Mich.

§ 16. Where policy provides that loss is payable sixty days after due notice and proofs are furnished, interest becomes due from that time. *Hastings v. Westchester Fire Ins. Co.* 73 N. Y. 141. 1878.

§ 17. The Wisconsin statute of 1874, which makes the amount of insurance written in the policy conclusive of the value of the property at time of loss, and fixes

that amount as the measure of damages, renders all other evidence of value immaterial. *Bammessel v. Brewers' Fire Ins. Co.* 7 Ins. L. J. 767. 1878. Wis.

§ 18. When there is an express promise to pay amount of adjustment, interest commences to run from its making. *Home Ins. Co. v. Myer*, 93 Ill. 271. 1879.

§ 19. In an action by a contractor and builder upon a policy insuring his interest as such it is no defense that he failed to continue proceedings under the mechanics' lien law after filing notice and commencement of an action. *Royal Ins. Co. v. Stinson*, 10 Ins. L. J. 687. 1880. U. S. Sup. Ct.

§ 20. The right to interest was not lost or suspended during the continuation of the civil war. *Portsmouth Ins. Co. v. Reynolds*, 32 Grat. 613. 1880.

§ 21. Jury having found that no portion of the brick walls of the building insured remaining after the fire could be used in rebuilding, that the foundations so remaining were not sufficient to support a building of the weight and dimensions of the one burned, that the expense of removing the worthless fragments of the old building would at least equal the value of all the material left after the fire, and that such materials were worth less than the cost of getting them out of the burned building; *Held*, that these findings show that the building in question was wholly destroyed within the meaning of that term as used in the statute, chap. 347, 1874. *Harriman v. Queen Ins. Co.* 49 Wis. 71. 1880.

§ 22. Damages on property specifically insured cannot exceed amount named. *Dacey v. Agricultural Ins. Co.* 21 Hun. 83. 1880.

See Agent, § 24, 52. Arbitration, 8. Covenant to Insure, 1. Evidence, 3, 4, 5, 9, 20, 21, 28, 28, 31, 34, 36, 46, 48, 49, 50, 52, 55, 60, 67, 74, 76, 81. Insurable Interest, 11, 14, 20, 46, 47, 48. Interest in Policy, 2, 9, 24. Mortgagor and Mortgagee, 1, 8, 4, 10, 11, 19, 20, 21, 26, 42. Mutual Company, 87, 70. Parol contract, 27. Proofs of Loss, 25. Questions for Court and Jury, 11. Rebuild, &c., 4, 6, 8. Re-Insurance, 12. Risk, 14. Usage or Custom, 2. Valued Policy, 3.

## DEFINITIONS.

§ 1. The term gross negligence, as used in a condition exempting from loss on that account, is the want of that diligence which even careless men are accustomed to exercise. *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230. 1874.

§ 2. Insurance is a contract of indemnity and it appertains to the person or party of the contract and not the thing which is subjected to the risk against which its owner is protected. *Cummings v. Ins. Co.* 55 N. H. 457. 1875.

§ 3. The word "contiguous" means in close proximity. A building located fifty feet from another would not be contiguous to the latter. *Arkell v. Commerce Ins. Co.* 69 N. Y. 191. 1877.

§ 4. An insurance policy is a mere contract of indemnity against loss of property, and not an instrument of commerce within the meaning of the United States Constitution. *Ins. Co. of N. A. v. The Commonwealth*, 87 Pa. 173. 1878.

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## DESCRIPTION.

§ 1. When assured accepts policy without objection, or attempt to have any mistake corrected, he cannot recover if the description cannot be applied to the property burned. *Goddard v. Monitor Ins. Co.* 108 Mass. 56. 1871.

§ 2. An agent, knowing location, in writing policy made a mistake in writing southwest corner of Second and *Vine* instead of "Elm" street. Building was described as being occupied by assured. *Held*, that plaintiff could recover upon the policy and there was no necessity

of applying for reformation. Am. Cent. Ins. Co. v. McLanathan, 11 Kans. 533. 1873.

§ 3. The fact that the assured calls herself Connor instead of O'Connor is immaterial if she was known by both names and identity is clearly made out. Hibernia Ins. Co. v. O'Connor, 29 Mich. 241. 1874.

§ 4. When goods are represented and described in policy as being in a "store," the fact that they are contained in a lodging and boarding house or tavern is a misrepresentation avoiding the insurance. In such a case the distinction between a tavern and a hotel is without any difference. Prudhomme v. Salamander Fire Ins. Co. 27 La. Ann. 695. 1875.

§ 5. The phrase "a three story granite building" applies to a building with a granite front only, and three stories high in front and rear, although only one story high in the middle. Medina v. Builders' Mut. Fire Ins. Co. 120 Mass. 225. 1876.

§ 6. Property being described as contained in a "two story brick building," there is no such misdescription as would avoid it, the building being two stories in front only and one story in the rear. Carr v. Hibernia Ins. Co. 2 Mo. App. 466. 1876.

§ 7. If there is enough of the description true to correct a mistake in the number of the block insured by construction it does not affect the validity of the contract. Ins. Co. v. Lewis, 48 Texas, 622. 1878. Texas Ins. Co. v. Stone, 49 Id. 4. 1876.

See Estoppel, § 12, 28. Evidence, 2, 25, 26, 42, 48, 83. Mutual Company, 49. Reformation, 11. Risk, 2, 4, 5, 8, 10, 12, 13. Warranty and Representation, 48. What property is covered, 20.

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## DISTANCE OF OTHER BUILDINGS.

§ 1. The words "standing detached" cannot be limited in number of feet by evidence of custom and understanding among insurance companies, unless it can be also shown that the assured had knowledge or notice of such custom. *Hill v. Hibernia Ins. Co.* 10 Hun, 26. 1877.

See Application, § 4. Concealment, 11. Definitions, 3. Warranty and Representation, 26, 109.

## ENCUMBRANCE.

§ 1. When there is nothing in the policy requiring disclosure of encumbrances, their materiality may be properly left to the jury. *Perkins v. Equitable Ins. Co.* 4 Allen, N. B. 562. 1860.

§ 2. A judgment lien constitutes an encumbrance. *Bowman v. Franklin Fire Ins. Co.* 40 Md. 620. 1874.

§ 3. Assured being required to state encumbrances by terms of policy, there being no written application, his failure to disclose a mortgage covering the insured property, avoids the insurance. *Beck v. Hibernia Ins. Co.* 44 Md. 95. 1875.

§ 4. A condition providing that if the insured property should be encumbered without notice and consent, it should be void, is both valid and reasonable, and will be enforced. *Fuller v. Madison Mut. Ins. Co.* 36 Wis. 599. 1875.

§ 5. *Sembler* that the validity of a mortgage may be tried and determined in a suit to recover the insurance, company relying upon its existence to sustain their defense. *Lycoming Ins. Co. v. Jackson*, 83 Ill. 302. 1876.

§ 6. Policy provided that if the property should be encumbered by a mortgage, judgment, or otherwise, and that if the same should be so encumbered it must be so represented to the company in the application, otherwise the policy should be void. There was a mortgage at the time of the issue of the policy of \$400. There was a question in the application in regard to encumbrance, which did not appear to have been answered, although the word "no" appeared there written in pencil, but there was no evidence that the assured had either written or authorized it. *Held*, that plaintiff could not recover. *Kennedy v. Agricultural Ins. Co.* 1 Russel & C. N. S. 433. 1876.

§ 7. Company sending money by letter after a loss to a mortgagee operates as a written consent to the encumbrance created by the mortgage. *Hazzard v. Canada Agricultural Ins. Co.* 39 Up. Can. Q. B. 419. 1876.

§ 8. The existence of an encumbrance is not a fact or circumstance in regard to the condition, situation, value or risk of the property. *Samo v. Gore District Mut. Fire Ins. Co.* 1 Tupper, 545. 1877. Rev'g 26 C. P. 405.

§ 9. A vendor's lien for unpaid purchase money is an encumbrance. *Chatillon v. Canadian Mut. Ins. Co.* 27 Up. Can. C. P. 450. 1877.

§ 10. Policy provided that if company should not be notified of subsequent encumbrances and consent obtained that it should be void. It was assigned to plaintiff, who gave a mortgage to the assured upon property insured. *Held*, that the insurance was thereby rendered void. *Parker v. Agricultural Mut. Ins. Co.* 28 Up. Can. C. P. 80. 1877.

§ 11. A mortgage that has been paid, although not discharged of record, is no encumbrance. *Merrill v. Agricultural Ins. Co.* 73 N. Y. 452. 1878. Aff'g 10 Hun, 428.

§ 12. Policy provided that "should there, during the life of this policy, an encumbrance fall or be executed upon the property insured sufficient to reduce the real interest of the insured in the same to a sum only equal to or below the amount of the insurance, and he neglect and fail to ob-

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tain the consent of the company," then and in such case it shall be void. *Held*, that if the assured suffers a judgment to be entered against him, an encumbrance falls within the meaning of the condition, or otherwise, if the encumbrance gives another a right and lessens his own interest in the property to a sum not exceeding the amount in the policy, it is forfeited. *Kensington National Bank v. Yerkes*, 86 Pa. 227. 1878.

§ 13. When policy permits an encumbrance to amount to one thousand dollars, a mortgage for twelve hundred renders it void. *Sentell v. Oswego County Farmers' Ins. Co.* 16 Hun, 516. 1879. *s. p. Gould v. Holland Purchase Ins. Co.* 16 Hun, 538. 1879.

§ 14. A void mortgage cannot be regarded as an encumbrance. *Watertown Ins. Co. v. Grover & Baker Sewing Machine Co.* 41 Mich. 131. 1879.

§ 15. Payment of an encumbrance cannot be presumed. *Gould v. Holland Purchase Ins. Co.* 16 Hun, 538. 1879.

§ 16. Policy contained condition that "this company shall not be liable, if, without written consent hereon, the property shall hereafter become encumbered in any way." *Held*, it referred to encumbrances created by act of the assured, and has no application to encumbrances by judgment, or otherwise created by operation of law. *Baley v. Homestead Fire Ins. Co.* 80 N. Y. 21. 1880. *Aff'g 16 Hun, 503. s. p. Steen v. Niagara Ins. Co.* 12 N. Y. Week. Dig. 3. 1881. N. Y. Sup.

§ 17. Company seeking to avoid policy on the ground of the existence of a mortgage as an encumbrance is bound to show that the mortgage is such in reality as well as in appearance. An encumbrance outstanding which is itself barred at law and in equity by the statute of limitations is not a real imperfection in the title. *Lockwood v. Middlesex Mut. Ins. Co.* 47 Conn. 553. 1880.

§ 18. Policy provided that company should not be liable for a loss if, without written consent on the policy, property should become encumbered in any way. It was

issued September 4, 1876. Notice of claim under mechanics' lien law was filed September 19, 1876. Fire occurred October 14, 1876. *Held*, it not being claimed that the notice was filed by the procurement of the assured, that the notice was not such an encumbrance as was contemplated by the condition. That the condition applies only to encumbrances created by or with the assent of the assured, and to the creation of which he might apply for the consent of the company, and that its true meaning was that the assured should not encumber the property without first obtaining the consent of the company. *Green v. Homestead Fire Ins. Co.* 82 N. Y. 517. 1880. Aff'd 17 Hun, 467.

§ 19. A subsisting mechanics' lien for which a petition is filed, is an encumbrance. *Redmon v. Phoenix Fire Ins. Co.* 51 Wis. 292. 1881. Wis.

§ 20. A chattel mortgage made for a special purpose which has been accomplished, and the mortgage being no longer a legal obligation, although it remains undischarged on the record, is no encumbrance. *Baile v. St. Joseph F. and M. Ins. Co.* 10 Ins. L. J. 657. 1881. Mo.

§ 21. Encumbrances were represented as amounting to about three thousand dollars, when in fact they amounted to \$4,425. *Held*, such a misrepresentation as to avoid the insurance without reference to the good faith of the assured. *Glade v. Germania Fire Ins. Co.* 12 Rep. 238. 1881. Iowa.

See *Alienation*, § 61. *Concealment*, 8, 10. *Entirety and Divisibility of Policy*, 2, 5, 8, 9. *Estopel*, 87. *Evidence*, 24, 57. *Insurable Interest*, 13, 47. *Mutual Company*, 111. *Other Insurance*, 43. *Pleading and Practice*, 20, 27. *Proofs of Loss*, 38. *Renewal*, 7, 14. *Title*, 8, 16, 18, 34, 37, 51, 56. *Use and Occupation*, 20. *Warranty and Representation*, 20, 81, 86, 89, 94, 99, 102, 104.

## ENTIRETY AND DIVISIBILITY OF POLICY.

§ 1. A contract of insurance is entire, although covering different items, and if assured has falsely and fraudulently sworn to a false statement in regard to one of the items, it avoids the entire insurance. *Cashman v. Lond. & Liv. Fire Ins. Co.* 5 Allen, N. B. 246. 1862.

§ 2. The effect of insuring separate buildings for separate sums is only to limit the liability of the company to each. An incumbrance upon or affecting one of the buildings only, renders the whole policy void. *Bleakley v. Niagara District Ins. Co.* 16 Grant Ch. 198. 1869.

§ 3. Where the consideration is entire, the contract is entire, although its subjects may consist of several distinct and wholly independent items. When policy covers building and machinery, if void as to one it is entirely void. *Bowman v. Franklin Fire Ins. Co.* 40 Md. 620. 1874.

§ 4. Contract of insurance is entire, and failing in part it fails wholly notwithstanding the insurance is itemized or specified in the policy as being so much upon the building and so much upon personal property contained therein. *Hinman v. Hartford Fire Ins. Co.* 36 Wis. 159. 1874.

§ 5. When the consideration for the insurance is single and entire the sole effect of apportionment upon separate and distinct items of the property named in the policy is to limit the extent of the insurer's risk as to each such item to the sum so specified; if the facts which constitute a forfeiture are connected with one of the items only it voids the entire policy. Policy contains condition that if the insured should mortgage the property without notice it should be void. *Held*, that the whole was rendered void by a mortgage of a portion of the insured property. *Plath v. Minnesota Farmers' Mutual Ins. Co.* 23 Minn. 479. 1877.

§ 6. Fraud and false swearing as to one item of the insurance covered by the policy avoids the whole contract.  
*Moore v. Virginia Fire Ins. Co.* 28 Grat. 508, 524. 1877.

§ 7. When policy provides that if the property be sold without consent indorsed upon it, it should be void, the sale of a part or a portion only does not effect a forfeiture of the whole. *Quarrier v. Peabody Ins. Co.* 10 W. Va. 507. 1877.

§ 8. Policy insured \$1,000 on building and \$2,000 on stock. It contained a clause avoiding it in case any incumbrances should be concealed. There were in fact several mortgages upon the real estate. *Held*, that the contract was entire and indivisible, and that the existence of the incumbrances on the building rendered the whole policy void. *Gore District Mut. Fire Ins. Co. v. Samo*, 2 Can. Sup. 411. 1878.

§ 9. Policy covered \$6,000, being divided into specific insurance on buildings, and various articles of personal property, in all, fourteen items. It provided that if property should be incumbered by mortgage, or otherwise, it should be void. A mortgage was given covering the buildings. *Held*, that the contract was not entire, but was divisible; that the breach of the condition applied only to class of property insured, which was the immediate subject of the act of incumbrance which constituted that breach. That plaintiff could recover upon the other items. *Merrill v. Agricultural Ins. Co.* 73 N. Y. 452. 1878. *Aff'g 10 Hun, 428. s. p. Holmes v. Drew*, 16 Hun, 491. 1879. *Sunderlin v. Ætna Ins. Co.* 18 Hun, 522. 1879. *Dacey v. Agricultural Ins. Co.* 21 Hun, 83. 1880.

§ 10. Alienation by assured of one of several items or parcels of property separately insured in same policy, renders the whole policy void. *Baldwin v. Hartford Ins. Co.* 10 Ins. L. J. 433. 1881. N. H.

See Adjustment, § 3. Illegality of Contract, 3. Warranty and Representation, 65.

## ESTOPPEL.

§ 1. Notice to an agent is inoperative to effect an estoppel or waiver unless such agent has power and authority to indorse company's consent to the fact conveyed by such notice. Notice of other insurance to be thus effectual must be given to an agent who is authorized to indorse consent upon the policy. *Hendrickson v. Queen Ins. Co.* 30 Up. Can. Q. B. 108. 1870.

§ 2. Oral consent of local agent to transfer of property pending obtaining of indorsement on the policy operates as an estoppel. *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354. 1870.

§ 3. Statement in proofs of existence of other insurance cannot operate as an estoppel against evidence tending to show that such other insurance was in fact invalid. *Hubbard v. Hartford Fire Ins. Co.* 33 Iowa, 325. 1871.

§ 4. Assured is not estopped by a statement made by him in his examination under oath, from establishing the truth to the contrary upon a trial. *Germania Fire Ins. Co. v. Curran*, 8 Kana. 9. 1871.

§ 5. Defendant issued policy for one year covering goods on first floor of building specified. Year being about to expire, and the goods in meantime having been removed to an upper story of same building, plaintiff gave notice to defendant of such change of location, and paid for a renewal receipt delivered to him. No indorsement of the change. *Held*, that company intended to give valid insurance in the new location, and that they intended insured to believe that he had received such. To suppose otherwise would impute a fraudulent disposition. *Ludwig v. Jersey City Ins. Co.* 48 N. Y. 379. 1872.

§ 6. Compromise and payment is a waiver of objection that premium has not been paid and is a recognition of the policy as a valid contract; by acceptance assured

is estopped from maintaining an action for the difference between such amount and the amount which would otherwise be due as adjusted and apportioned. *Haight v. Kramer*, 9 Phil. Rep. 50. 1872.

§ 7. Knowledge of company's agent does not operate as an estoppel when the defense is fraud and collusion between him and the assured. *Rockford Ins. Co. v. Nelson*, 65 Ill. 415. 1872.

§ 8. Company is estopped from insisting on a defense in regard to other insurance when it is shown that the assured was induced to apply for the policy by the fraudulent misstatements and omissions of the agent, and that he was kept in ignorance of the existence of the stipulation in the policy by fraudulent conduct and statements of the agent which induced him not to open and read it. *McKenzie v. Fire Ins. Co.* 9 Heiskell, 261. 1872.

§ 9. The knowledge of insurance brokers is not the knowledge of the company so as to effect an estoppel. *McFarland v. Peabody Ins. Co.* 6 W. Va. 425. 1873.

§ 10. When party claims an estoppel upon a written statement furnished, it cannot be sustained when he is obliged to inquire for and establish the existence of *other* facts. Such facts may be contradicted. *McMaster v. Ins. Co. of N. A.* 55 N. Y. 222. 1873.

§ 11. The fact that company knew of the use of spirit gas by a former tenant does not justify a finding that the assured had permission for its continued or future use. *Minzesheimer v. Continental Ins. Co.* 5 Jones & Sp. 332. 1874.

§ 12. Although the assured may have represented the premises to be frame and shingle houses, yet as the agent of the company was present and inspected the buildings at the time of the insurance and before the issue of the policy and inserted the description in the policy based upon his own inspection as well as the insured's representation, and such a description was a mistaken one, the company is estopped from insisting upon a breach

of warranty in respect to such description. Continental Ins. Co. v. Kasey, 25 Grat. 268. 1874.

§ 13. The provision that an indorsement shall be made upon the policy is nothing but a direction that an act shall be done, and falls into the class of ordinary conditions precedent. And such provision may be waived or the company estopped by its conduct from insisting upon a forfeiture, by reason of facts occurring after issue and delivery of policy and during its continuance. Pechner v. Phoenix Ins. Co. 35 N. Y. 195. 1875. But see Walsh v. Hartford Fire Ins. Co. 73 N. Y. 5. 1878.

§ 14. When policy is issued by an agent having knowledge of the actual condition of the chimney, stoves and pipes of the building insured, company is estopped from insisting upon any breach of warranty in relation thereto. If such a warranty should be promissory in its nature assured is bound only to keep them as secure as they were when the application was made, it not appearing that the company or its agent gave notice or intimated to the assured in any respect that the stove pipes and chimney were in anywise insecure or required them to be made more secure. Simmons v. Ins. Co. 8 W. Va. 474. 1875.

§ 15. When the insured is disposed and makes an effort to have a mistake corrected in the policy, but is prevented or thrown off his guard and dissuaded therefrom by the act or declaration of the company, the latter is estopped from setting up in bar of an action upon the policy, the letter of the contract, and that the situation of the property does not agree therewith, and from claiming the strictly legal consequences. Maher v. Hibernia Ins. Co. 67 N. Y. 283. 1876. Aff'g 6 Hun, 353.

§ 16. Policy provided that if premises should be unoccupied for over thirty days without written consent indorsed, it should be void. About one week after property was left vacant assured asked company's secretary to put his consent on the policy, and he said in reply, "we waive all that." Fire occurred while premises were unoccupied,

and about four weeks later. *Held*, that, as at time of interview with secretary forfeiture had not taken place, it could have been prevented by the assured had he not been misled by the verbal consent, there was a waiver. Company cannot insist upon a forfeiture for an act which they themselves induce the assured to do. *Adams v. Greenwich Ins. Co.* 9 Hun, 45. 1876. Aff'd 70 N. Y. 166, 171. *s. p. Van Allen v. Farmers' Joint Stock Ins. Co.* 10 Hun, 397. 1877. Aff'd 72 N. Y. 604.

§ 17. Policy provided that if the premises should become vacated by removal, and so remain for a period of more than fifteen days without notice and consent indorsed upon the policy, it should become void. The premises were burned during such vacancy. Evidence was received that before the issuing of the policy the insured had stated to the agent that he expected, during the continuance of the policy, to leave the house vacant during a year or more, and was informed it would make no difference, such evidence being relied upon as an estoppel. *Held*, that the cases which hold that an estoppel is created by knowledge of the company relate to a knowledge of existing facts at the time of its action, when such action would not be consistent with any idea that they were to be discharged from liability by reason thereof, but that in this case the vacancy concerning which the parties conversed was one contemplated in the future, and the stipulation or understanding, if it amounted to anything, was an executory contract intended to form a part of the contract of insurance. This being so, the doctrine cannot be admitted that any part of the completed contract can rest in parol. The policy was the conclusion of the bargain, and its acceptance would exclude any parol promises inconsistent with it, and that, therefore, the company was not estopped from insisting upon the defense. *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609. 1877.

§ 18. If agent's duty to insert in policy nature of assured's interest as disclosed to him, his failure to do it estops the company from objecting to validity of policy by reason of such omission. *Gates v. Penn Fire Ins. Co.* 10 Hun, 489. 1877.

§ 19. When assured is induced by the act or declaration of company's local agent, accustomed to receive and forward notices of loss, to delay the furnishing of proofs, company is estopped from insisting upon such delay as ground of forfeiture. *Van Allen v. Farmers' Joint Stock Ins. Co.* 10 Hun, 397. 1877. Aff'd 72 N. Y. 604 (on opinion of lower court). And same when the delay is induced by an adjuster. *Id.*

§ 20. When secretary states to the assured "that it is not necessary to have his indorsement of the approval of the company of an assignment on the back of the policy, company is estopped from setting up a defense founded upon such assignment. *Stolle v. Aetna Ins. Co.* 10 W. Va. 546. 1877.

§ 21. Policy required that if building insured stood on leased land, it must be so represented to company and expressed in written part. Company's agent knew when he accepted the risk that building stood on leased ground, but the fact was not inserted in the policy. *Held*, that company was estopped from setting up defense under condition. *Van Schoick v. Niagara Fire Ins. Co.* 68 N. Y. 434. 1877. *It seems* policy in this case did not contain usual agency clause. P. 441.

§ 22. Company is estopped by mistakes of agent in filling up an application, the facts at the time being correctly stated to him by the assured. *Planters' Ins. Co. v. Sorrels*, 1 Baxt. 352. 1872. *McBride v. Republic Fire Ins. Co.* 30 Wis. 562. 1872. *Cheek v. Columbia Ins. Co.* 4 Ins. L. J. 99. 1874. *Tenn. Parker v. Amazon Ins. Co.* 34 Wis. 364. 1874. *Chatillon v. Canadian Mut. Fire Ins. Co.* 27 Up. Can. C. P. 450. 1877. *Ins. Co. v. Lewis*, 48 Tex. 622. 1878. *Texas Ins. Co. v. Stone*, 49 Tex. 4. 1878.

§ 23. Policy described the property as being occupied "as a dwelling and boarding house." The insurance was obtained through one Buckley, an agent of the company. The judge at the trial received evidence that he inspected the premises at the time of taking the application, and knew the manner in which they were thus used, and left

the question to the jury whether the parties themselves did not knowingly use the term "boarding house," to describe the very thing that was insured, and if they did in that view, the knowledge of the agent was material; that if agent, acting on his own knowledge, making his own survey, undertook to describe the building, it is his description of the risk, and if the company accepts it, it agrees that the term used shall describe the risk as it existed. *Held*, error, as the effect given to the testimony was to change the terms of the contract and reform it, and make another and a different contract; such facts cannot operate as an estoppel. *Franklin Fire Ins. Co. v. Martin*, 11 Vroom, N. J. L. R. 568. 1878.

§ 24. Policy provided that if any misrepresentation or concealment of facts has been made in the application \* \* \* or if assured shall, in any manner, make an attempt to defraud this company, policy shall be void. It appeared that in the application assured had omitted to mention a small building, a water closet, within about forty-six feet of the premises. It appeared, before the issue of the policy, agent of the company inspected and surveyed the premises. *Held*, that the condition contemplated fraudulent concealment only, and that the company was estopped by the inspection of the agent. *Naughter v. Ottawa Ins. Co.* 43 Up. Can. Q. B. 121. 1878.

§ 25. Assured stated in his application for insurance upon a mill, that there was no other insurance, when, in fact, there was another policy on the machinery therein. *Held*, that the insurance was thereby rendered void, and that company was not estopped by knowledge of its agent; that assured's remedy was in equity by reformation of the policy. *Shannon v. Gore District Mut. Fire Ins. Co.* 2 Tupper, 396. 1878. Rev'g 40 Up. Can. Q. B. 188.

§ 26. When an agent authorized to take applications for a company intentionally or negligently writes a wrong answer, or misleads the assured in the taking and filling up of an application for insurance, it is error to exclude parol evidence of what actually did occur, and what was

said by the assured, at the time of the taking of his application. If such agent received correct information, company will not be permitted to escape from liability on account of his error or neglect. *Smith v. Farmers' & Mechanics' Mut. Ins. Co.* 89 Pa. 287. 1879.

§ 27. Assured being bound to represent the true state of title, before company can be bound by knowledge of its agent, it must appear that he knew the entire truth. It is not enough that he was put upon inquiry. *Bell v. Lycoming Fire Ins. Co.* 19 Hun, 238. 1879.

§ 28. Policy appointing payee to receive the loss, if any, "as interest may appear," does not show knowledge in agent or company of true condition of title. Such a statement cannot, of itself, operate as a waiver of conditions, or estop the company from insisting upon a breach as a bar to recovery. *Lasher v. Northwestern Nat. Ins. Co.* 18 Hun, 104. 1879.

§ 29. The giving of a certificate by a local agent, certifying that a policy had been applied for and was obtained, to a sheriff, in consequence of which a writ of execution is stayed and policy remains in possession of the agent, and is never delivered to the assured or to the parties to whom the loss was made payable, does not operate as an estoppel. *Greene v. Lycoming Fire Ins. Co.* 91 Pa. 387. 1879.

§ 30. *Sembles* that to estop company from insisting upon forfeiture on the ground of agent's knowledge at the time of the issue of the policy, it must appear not only that the agent knew generally the fact of the existence of other insurance, but that he knew its amount. *Billington v. Provincial Ins. Co.* 3 Can. Sup. 182. 1879.

§ 31. Notice to a soliciting agent of the existence of other insurance is notice to the company, which is estopped from defending upon that ground. *Brandaf v. St. Paul Fire Ins. Co.* 11 Rep. 434. 1880. Minn.

§ 32. When a company joins with others in an adjustment and promises to pay its allotted portion, and assured

settles with the other companies on basis of such adjustment, the former company is estopped to deny its liability. *Fishbeck v. Phoenix Ins. Co.* 54 Cal. 422. 1880.

§ 33. Promise of an agent to procure necessary endorsement of consent to an assignment of a policy does not estop the company from insisting upon a forfeiture. *Shuggart v. Lycoming Fire Ins. Co.* 55 Cal. 408. 1880.

§ 34. If a company insures goods, using general terms in their description, and the agent who issues the policy tells the assured that the description includes benzine, it is estopped in case of loss from claiming that benzine is prohibited and that its being on the premises avoids the insurance. *Carrigan v. Lycoming Ins. Co.* 10 Ins. L. J. 606. 1881. Vt.

§ 35. It is not essential that knowledge of an agent be acquired in connection with issue of particular policy in suit, it being, in effect, a renewal of one previously existing, in course of issuing and transferring which agent acquired his information. *Broadhead v. Lycoming Fire Ins. Co.* 23 Hun, 397. 1881.

§ 36. A soliciting agent has no authority by virtue of such employment to consent to other insurance, and notice to him of such other insurance is not notice to the company. *Heath v. Springfield Fire Ins. Co.* 12 Rep. 213. 1881. N. H.

§ 37. Issue of policy by agent with knowledge of facts constituting a forfeiture estops company from setting up same as a defense. *Commercial Ins. Co. v. Ives*, 56 Ill. 402. 1870. *Home Mut. Ins. Co. v. Garfield*, 60 Ill. 124. 1871. *Gershauser v. N. B. and M. Ins. Co.* 7 Neb. 174. 1871. *Planters' Mutual Ins. Co. v. Deford*, 38 Md. 382. 1873. *Field v. Ins. Co. of N. A.* 6 Biss. 121. 1874. *Russell v. State Ins. Co.* 55 Mo. 585. 1874. *Michigan State Ins. Co. v. Lewis*, 30 Mich. 41. 1874. *Hadley v. Ins. Co.* 55 N. H. 110. 1875. *Andes Ins. Co. v. Shipman*, 77 Ill. 189. 1875. *Lycoming Ins. Co. v. Jackson*, 83 Ill. 302. 1876. *Liv. Lond. and G. Ins. Co. v. McGuire*, 52 Miss. 227. 1876. *Carr v. Hibernian Ins. Co.* 2 Mo. App. 446.

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1876. Aurora Fire Ins. Co. v. Kranich, 36 Mich. 289.  
1876. Mers v. Franklin Ins. Co. 68 Mo. 127. 1878.  
Weeks v. Lycoming Ins. Co. 7 Ins. L. J. 552. 1878. U.  
S. Circuit, Vt. In regard to storing or keeping of gun-  
powder. Reaper City Ins. Co. v. Jones, 62 Ill. 458. 1872.  
In regard to watch, clock. Andes Ins. Co. v. Shipman,  
5 Ins. L. J. 137. 1875. Ill. In regard to value. Red-  
ford v. Mutual Fire Ins. Co. 38 Up. Can. Q. B. 538. 1876.  
Dacey v. Agricultural Ins. Co. 21 Hun, 83. 1880. In re-  
gard to incumbrances. Dean v. Western Ins. Co. 41 Up.  
Can. Q. B. 553. 1877. Naugther v. Ottawa Ins. Co. 43  
Up. Can. Q. B. 121. 1878. Harriman v. Queen Ins. Co.  
49 Wis. 71. 1880. And result is not affected by the fact  
that the application states that the agent is to be deemed  
in filling it up as the agent of the applicant and not of  
the company. Naugther v. Ottawa Ins. Co. *supra*. In  
regard to building being vacant or unoccupied. Georgia  
Home Ins. Co. v. Kinnier, 28 Grat. 88. 1876. Williams  
v. Niagara Ins. Co. 50 Iowa, 561. 1879. Imperial Fire  
Ins. Co. v. Sherman, 96 Ill. 580. 1880. Poor v. Hudson  
Ins. Co. 9 Ins. L. J. 428. 1880. U. S. Circuit, N. H.  
Woodruff v. Imperial Fire Ins. Co. 83 N. Y. 133. 1880.  
In regard to other insurance. Hayward v. National  
Ins. Co. 2 Ins. L. J. 503. 1873. Mo. Farmers' Ins. Co.  
v Taylor, 73 Pa. 342. 1873. Lycoming Ins. Co. v.  
Banninger, 73 Ill. 230. 1874. Sherman v. Madison Ins.  
Co. 39 Wis. 104. 1875. Pitney v. Glen's Falls Ins. Co.  
65 N. Y. 6. 1875. Pechner v. Phoenix Ins. Co. Id. 195.  
Shannon v. Gore District Ins. Co. 40 Up. Can. Q. B. 188.  
1876. Roberts v. Continental Ins. Co. 41 Wis. 321.  
1877. American Ins. Co. v. Luttrell, 89 Ill. 314. 1878.  
Richardson v. Westchester Fire Ins. Co. 15 Hun, 472.  
1878. Richmond v. Niagara Ins. Co. 79 N. Y. 230. 1879.  
American Ins. Co. v. Gallatin, 48 Wis. 37. 1879. Fish-  
beck v. Phoenix Ins. Co. 54 Cal. 422. 1880. In regard to  
interest or title. American Central Ins. Co. v. McLanahan,  
11 Kans. 533. 1873. Rockford Ins. Co. v. Nelson,  
75 Ill. 548. 1874. Andes Ins. Co. v. Fish, 71 Ill. 620.  
1874. Manhattan Fire Ins. Co. v. Neill, 28 Grat. 389.  
1877. Broadhead v. Lycoming Ins. Co. 14 Hun, 452.  
1878. Chase v. People's Ins. Co. Id. 456. Phoenix Ins.  
Co. v. Tucker, 92 Ill. 64. 1879. Union Ins. Co. v. Chipp,

93 Ill. 96. 1879. Germania Ins. Co. v. McKee, 94 Ill. 494. 1880. Farmers' Ins. Co. v. Meekes, 10 Ins. L. J. 707. 1880. Pa. Ben. Franklin Ins. Co. v. Gillett, 9 Ins. L. J. 774. 1880. Md. Smith v. Commonwealth Ins. Co. 49 Wis. 322. 1880. Miaghan v. Hartford Fire Ins. Co. 24 Hun, 58. 1881.

See Adjustment, § 6. Agent, 11, 12, 25, 77, 79, 88, 89, 102. Application, 11. Assignment, 9. Cancellation, 9. Evidence, 57. Insurable Interest, 9. Limitation, 23. Mutual Company, 94, 107, 120. Notice of Loss, 15. Other Insurance, 12, 18, 24, 34. Parol Contract, 7, 18. Premium, 2, 5, 18. Proofs of Loss, 14, 25, 57, 58, 59. Renewal, 7. Storing and Keeping, 22. Title, 2, 11. Use and Occupation, 4, 9, 12. Vacant or Unoccupied, 23. Waiver, 15, 23, 25.

## EVIDENCE.

§ 1. It is not proper to ask the agent of company as to whether he would have issued the policy if certain facts had been made known to him. Perkins v. Equitable Ins. Co. 4 Allen, N. B. 562. 1860.

§ 2. Proof that company had insured property for years, and knew purpose for which it was erected, the manner in which it was occupied, general character of its contents, and nature and extent of the risk, is admissible as tending to aid the court in applying descriptive language of policy to actual subject of insurance, and in giving effect to the words of the contract in the precise sense in which they were understood and employed by the parties. Mayor of N. Y. v. Exchange Fire Ins. Co. 34 N. Y. 103.

§ 3. An adjustment of the amount of the loss, while not conclusive, may be adopted by the jury as evidence of value. Thompson v. Liv. Lond. & Globe Ins. Co. 2 Hannay, N. B. 259. 1870.

§ 4. In an issue upon cash value of a building destroyed, a witness may state what it cost to put up such

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a building forty years ago, without being an expert. *Tuckerman v. Home Ins. Co.* 9 R. I. 414. 1870.

§ 5. A verdict as to value or extent of loss cannot be sustained upon vague assertion or guess work. *Grubb v. Ins. Co.* 8 Phil. Rep. 29. 1870.

§ 6. Court cannot take judicial notice of inflammable qualities of kerosene and other liquids. These are facts which must be proved and established. *Wood v. Northwestern Ins. Co.* 46 N. Y. 421. 1871.

§ 7. In a suit upon the *policy* parol evidence is inadmissible to show intent of parties to be different from what the words express, and when language employed has a settled legal construction, such evidence cannot be admitted to contradict such construction. All understandings are merged in the written instrument, and neither party can be permitted to prove that the instrument does not mean what it says. *Pindar v. Resolute Fire Ins. Co.* 47 N. Y. 114. 1871. *S. P. Mills v. Farmers' Ins. Co.* 37 Iowa, 400. 1873. *McCluskey v. Providence Ins. Co.* 126 Mass. 306. 1879.

§ 8. Where plaintiff applied for insurance by mailing to defendant another policy, with request that its "wording should be followed exactly," and such policy in terms insured stock "such as is usually kept in country stores." *Held*, in a suit upon the *policy*, the evidence inadmissible for purpose of showing notice to defendant. That such notice was not material, so long as defendant did not accept risk as offered, or insert in its policy permission to keep prohibited goods. If assured was not content with policy sent, he should have rejected it, and his failure to read it could not enlarge the liability imposed upon defendant. *Pindar v. Resolute Fire Ins. Co.* 47 N. Y. 114. 1871.

§ 9. The opinion of a witness as to the value of a stock of goods is not admissible unless he is an expert; the question as to whether such witness is qualified as an expert must be determined by the court. *Taylor v. Ins. Co.* 51 N. H. 50. 1871.

§ 10. Upon an issue as to fraudulent statement of value and extent of loss upon a stock of goods, the question to a witness who resides at another place, whether the amount of stock carried by his firm for their average year's sales was or was not the prudent proportion of stock to sales in that business, is properly excluded. *Sembler* such evidence may be competent where the witness is in the same kind of business in the same place. *Jones v. Mechanics' Fire Ins. Co.* 7 Vroom, N. J. L. R. 29. 1872.

§ 11. The wife of the assured, although authorized to make the necessary proofs of loss cannot be examined as a witness in regard to the title of her husband and the assured. *O'Connor v. Hartford Fire Ins. Co.* 31 Wis. 160. 1872.

§ 12. Evidence that the company had in other instances as to other parties waived a compliance with the condition requiring notice in the case of transfer or alienation is inadmissible, although it seems that such evidence may be admissible if shown to be the custom of all fire insurance companies. *Burger v. Firemen's Mutual Ins. Co.* 71 Pa. 422. 1872.

§ 13. Evidence of offers of compromise may be admissible as bearing upon question of sufficiency of proof of loss, unless they appear to have been confidential overtures of pacification, or expressly stated to be without prejudice. *Townsend v. Merchants' Ins. Co.* 4 Jones & Sp. 172. 1873.

§ 14. An insurance company acts and speaks by its officers and what they say and do when in the discharge of their duty in relation to the particular duty assigned to them is evidence against the company. *Muhleman v. National Ins. Co.* 6 W. Va. 508. 1873.

§ 15. The rule that parol testimony may not be given to contradict a written contract, is applied only in suits between parties to the instrument or their privies. The assured may give testimony by parol of *another* policy than one in suit, and the application of the description

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therein. McMaster v. Ins. Co. of N. A. 55 N. Y. 222. 1873.

§ 16. The question as to whether fire-works are in line of a certain business is not one to be answered by opinion of experts, but by an investigation of facts. Such an opinion is properly excluded. Steinbach v. La Fayette Ins. Co. 54 N. Y. 90. 1873.

§ 17. Where application was made for a policy like one of another company, and, as issued, contained a printed clause which the other did not, and a blank form of latter was admitted in evidence under objection, *Held*, no error; that as policies were to be alike, it was proper to show that latter policy did not contain the printed condition; and this was properly shown by the printed form. Van Tuyl v. Westchester Fire Ins. Co. 55 N. Y. 657. 1873. *Aff'g* 67 Barb. 72.

§ 18. A daughter of the assured, who bought a good many of the articles insured and was present when others were bought, can testify upon the question of value. Continental Ins. Co. v. Horton, 28 Mich. 173. 1873.

§ 19. The acts and declarations of an adjuster in the general scope of his employment are properly received in evidence and bind the company. Farmers' Ins. Co. v. Taylor, 73 Pa. 342. 1873.

§ 20. Upon an issue as to value of farm buildings evidence may be received of what was paid for a certain farm within two miles distance three years prior to the fire. Haines v. Republic Fire Ins. Co. 2 Ins. L. J. 833. 1873. N. H.

§ 21. Certificate of notary or magistrate is not competent evidence as to value. Farrell v. Ætna Fire Ins. Co. 7 Baxt. 542. 1874.

§ 22. Witness was asked, "State whether or not you complied substantially with the conditions of the policy issued to you by the Andes Ins. Co. on the first of April last?" He answered under objection, "I think I did; I did." *Held*, that the question was improper as

being too general and leading, as the answer would necessarily be a conclusion of law. *Daniels v. Andes Ins. Co.* 2 Mont. 78. 1874.

§ 23. Prior policy covering goods in question and known upon its expiration to company's agent, who issues a new one for same amount, is competent evidence of value, it being shown that the quantity and value remains the same up to the time of the fire. *Gulf City Ins. Co. v. Stephens*, 51 Ala. 121. 1874.

§ 24. Policy provided that any mortgage made subsequently to the insurance must be notified to the secretary in writing forthwith, otherwise it would be void. *Held*, that such condition was not complied with by deposit of such notice in the mail properly addressed, without proof of its receipt. *McCann v. Waterloo County Fire Ins. Co.* 34 Up. Can. Q. B. 376. 1874.

§ 25. When assured holds policy upon goods in store, for which he holds warehouse receipts, in case of loss, it is not necessary to prove the actual identity of the goods as described in the receipt, when it is shown that goods of the same character, kind and quantity were in the building in question at the time the policy was obtained and at the time of the fire. *Wilson v. Citizens' Ins. Co.* 19 L. C. Jurist, 175. 1875.

§ 26. A latent ambiguity in a description is removable by parol testimony. *Bowman v. Agricultural Ins. Co.* 59 N. Y. 521. 1875.

§ 27. A clause in policy making loss payable to a certain person as interest might appear, does not necessitate proof of any interest by him in the insured property. *Clay Ins. Co. v. Huron Man. Co.* 31 Mich. 346. 1875.

§ 28. When it is established by the testimony in connection with the laws of matter, that the goods for which assured claims a total loss were not in building at time of fire, a verdict for assured will be set aside as against the evidence. *Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 402. 1875.

§ 29. An error in admitting improper evidence is not cured by a direction to jury to disregard it. *Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 402. 1875.

§ 30. Counsel for company is a competent witness in its behalf. *Davis v. Canada Farmers Ins. Co.* 39 Up. Can. Q. B. 452. 1876.

§ 31. The failure of assured to call as a witness one who was his clerk at the time of the fire, to prove value of his goods, is a proper subject of remark by company's counsel in presentation of the case to the jury. *Fowler v. Old North State Ins. Co.* 74 N. C. 89. 1876.

§ 32. Entries upon broker's books may be competent as bearing upon question of mistake and credibility of broker and his clerks. *Standard Oil Co. v. Triumph Ins. Co.* 64 N. Y. 85. 1876. Aff'g 3 Hun, 591.

§ 33. A letter, being an offer of compromise, and containing no statement which can be separated from the offer and convey the idea which was in the witness' mind, is not admissible in evidence. *Home Ins. Co. v. Balt. Warehouse Co.* 3 Otto, 527. 1876.

§ 34. Evidence of statements or plans of adjustment made by experts, may be properly received, not as evidence of facts stated in them, but for the purpose of assisting the jury in calculating amount of liability, upon the several hypotheses of fact stated in them, jury being left free to accept either hypothesis or reject all. *Home Ins. Co. v. Balt. Warehouse Co.* 3 Otto, 527. 1876.

§ 35. A letter written by agent of other companies, containing statement "all my companies have paid, and I see no reason why the others should not pay," cannot be used on cross-examination of defendant's manager and witness for purpose of contradicting him. *Kaler v. Builders' Mutual Fire Ins. Co.* 120 Mass. 333. 1876.

§ 36. Any person acquainted with property and its value, or the value of like property, is a competent wit-

ness to prove its worth. *Lycoming Ins. Co. v. Jackson*, 83 Ill. 302. 1876.

§ 37. Testimony of experts is not admissible to prove the meaning of the terms "Dry Goods and Groceries" in a place other than the one where policy was issued. As to whether such testimony would be admissible if connected with the place where policy was issued *query?* *Germania Fire Ins. Co. v. Francis*, 52 Miss. 458. 1876.

§ 38. The evidence of a custom among brokers may be admissible. It is competent at least to explain conduct of parties, and how they regard verbal arrangements and the acts necessary to be done to consummate it. *Standard Oil Co. v. Triumph Ins. Co.* 64 N. Y. 85. 1876. *Aff'g 3 Hun*, 591.

§ 39. An averment of ownership is sustained by proof of an insurable interest. *Andes Ins. Co. v. Fish*, 71 Ill. 620. 1874. *Lycoming Ins. Co. v. Jackson*, 83 Ill. 302. 1876. *Rockford Ins. Co. v. Nelson*, 65 Ill. 415. 1872.

§ 40. Statements of assured are not admissible in evidence against a party to whom policy is made payable and who brings the action. *Smith v. Exchange Fire Ins. Co.* 8 Jones & Sp. 492. 1876.

§ 41. Mailing a letter properly stamped and addressed is evidence tending to show that it was received, but there is no conclusive presumption, not even a legal presumption, that it reaches its destination. *Edwards v. Mississippi Valley Ins. Co.* 1 Mo. App. 192. 1876.

§ 42. Blank form in use by a company may be sufficient secondary evidence of the conditions in original, but not of the description of the property, if company has kept no copy of the latter. *Johnson v. Canada Farmers' Ins. Co.* 28 Up. Can. C. P. 211. 1877.

§ 43. In the absence of sufficient evidence of written description of property in the policy, court will assume that it is the same as contained in the application. John-

son v. Canada Farmers' Ins. Co. 28 Up. Can. C. P. 211. 1877.

§ 44. One who has charge of the business carried on in a manufactory, with special opportunity to know, and has actual knowledge of the details and processes of the manufacturing and liability to fire, may give his opinion as to whether the risk is or is not increased by reason of a change in business. Brink v. Merchants' Ins. Co. 49 Vt. 442. 1877.

§ 45. An allegation of performance of condition allows proof of a waiver. Levy v. Peabody Ins. Co. 10 W. Va. 560. 1877.

§ 46. In an action by an insurance company against a railroad company to recover amount paid for a loss caused by sparks from engines of latter, proof of prior and subsequent emission of sparks by defendant's engines is admissible. Home Ins. Co. v. Penn. R. R. Co. 11 Hun, 182. 1877. In such an action interest is part of the damages, and its allowance a matter of discretion with jury. Id.

§ 47. It is not competent to corroborate an officer of company, when not impeached, by proof by himself of his general course of dealing, and the extent and limit of his powers, in regard to waiver. Adams v. Greenwich Ins. Co. 70 N. Y. 166. 1877. Aff'g 9 Hun, 45.

§ 48. Upon issue as to value, it is proper to show what the land sold for after the buildings were destroyed, as affording evidence of the value of the buildings when connected, with proof of what both together had before been offered for at sale. Bardwell v. Conway Ins. Co. 122 Mass. 90. 1877.

§ 49. Assured has a right, at the trial upon issue as to value, to inquire as to the nature and quality of the different parts of a building, the cellar inclusive, of any person acquainted with building. Bardwell v. Conway Ins. Co. 122 Mass. 90. 1877.

§ 50. Assured is not bound by the valuation of another company, upon which a policy had been issued and accepted by him. Such evidence is not admissible. Bardwell v. Conway Ins. Co. 122 Mass. 90. 1877.

§ 51. Company has no ground of exception in the exclusive evidence offered by it attacking the validity of a written instrument in evidence, and constituting an essential element of one of its defenses. Bardwell v. Conway Ins. Co. 122 Mass. 90. 1877.

§ 52. Assured may be questioned as to what valuation the agent of the company put on the property of the insured at the time of the issue of the policy, and if such value is the same in the answer as that stated in the policy it is admissible, not being in conflict with the written contract, but in confirmation of it. Southern Mut. Ins. Co. v. Frear, 29 Grat. 255. 1877.

§ 53. Declarations of an adjuster, made in the discharge of his duty, are properly admissible in evidence. Brink v. Merchants' Ins. Co. 49 Vt. 442. 1877.

§ 54. Service of a notice required by a condition in the policy by mail, raises a presumption that it was received; but such presumption is not conclusive, and may be rebutted by other evidence that such notice was never, in fact, received. Plath v. Minnesota Farmers' Mut. Ins. Co. 23 Minn. 479. 1877.

§ 55. In a country village, where there are few transfers of real estate, the price which a building would bring at present sale for cash, is not a fair criterion to determine valuation. Germania Fire Ins. Co. v. Casteel, 7 Ins. L. J. 253. 1877. Ill.

§ 56. Mailing of a notice or paper to company in an envelope properly addressed and stamped is presumptive evidence of its receipt, and if there is no evidence of its not being received, will sustain a finding that it was received. Shannon v. Hastings Mut. Ins. Co. 2 Tupper, 81. 1877. Confirming 26 C. P. 380.

§ 57. Property was first insured by a policy dated February 16, 1872, and expiring February 12, 1873. At time it was issued there was a mortgage existing, which, under the terms of the policy, rendered it void. Subsequently another policy was issued to same parties upon same property, containing a clause making loss, if any, payable to the mortgagees. This policy was issued October 12, 1872, for one year. February 13, 1873, the first policy was continued in force by a renewal receipt. *Held*, in suit upon first policy, that evidence was sufficient to sustain finding of jury that defendant, when it renewed the policy, had knowledge of the mortgage. *State Ins. Co. v. Todd*, 6 Ins. L. J. 893. 1877. Pa.

§ 58. Upon an issue as to whether agent who issued policy had notice of the existence of other insurance it is proper to ask, such agent being sworn as a witness on the trial, whether there was any rule that he followed, when he insured a piece of property, with reference to the amount of insurance, "assuming the value of the property to have been to your knowledge \$1,800, and no more, with \$600 insurance already upon it, would you have put \$1,200 more upon it?" *Roberts v. Continental Ins. Co.* 41 Wis. 321. 1877.

§ 59. An action against an insurance company must be tried upon the facts as they existed at the time it was brought, unless subsequently occurring facts be specially pleaded. *People's Ins. Co. v. Straehle*, 2 Cin. Sup. Ct. 186. 1878.

§ 60. Evidence of what another company has paid to the assured on account of the same fire may be properly received as showing what has been paid in reduction of defendant's risk. If the loss should prove to be less, its liability is reduced in proportion. *Pennsylvania Fire Ins. Co. v. Kittle*, 39 Mich. 51. 1878.

§ 61. It is error to reject proof of agency where assured relies upon waiver of condition requiring written consent. *McCabe v. Farm Buildings Fire Ins. Co.* 14 Hun, 602. 1878.

§ 62. A deed is not admissible in evidence to show a change of title or possession, without proof of recording, delivery, or possession under it. *Humphry v. Hartford Fire Ins. Co.* 15 Blatch. 35. 1878.

§ 63. Oral evidence is admissible to show what property was intended to be covered by general language in policy. *Snow v. Carr*, 61 Ala. 363. 1878.

§ 64. Secondary evidence may be given of policies cancelled and returned to home office of company in a foreign country. *Snow v. Carr*, 61 Ala. 363. 1878.

§ 65. It is error to exclude evidence bearing upon question as to knowledge of the agent, of facts existing at the time he takes an application for insurance. *Hanson v. Milwaukee Mechanics' Ins. Co.* 45 Wis. 321. 1878.

§ 66. The fact that the assured, being required by the policy to save the property insured, gave instructions "not to interfere unless all could be saved," to prevent dispute as to what was consumed, is immaterial, when it appears that it was impossible to have saved anything. *Willis v. Germania Ins. Co.* 79 N. C. 285. 1878.

§ 67. Evidence by experts of manner of adjustment of losses is incompetent unless assured has knowledge thereof at time of the issue of policy, or at least that the custom was so general and well understood that it must have entered into and formed part of the contract. *Williams v. Niagara Fire Ins. Co.* 50 Iowa, 561. 1879.

§ 68. In case of a mutual mistake between the parties, parol evidence is admissible to reform the policy. *Vilenberger v. Protective Mutual Fire Ins. Co.* 89 Pa. 464. 1879. *s. p. Brugger v. State Investment Ins. Co.* 5 Sawyer, 304.

§ 69. A letter from company to assured after the fire, being a written declaration of an officer in regard to his construction of the policy, is not admissible in evidence as against the assured. *Planters' Mut. Ins. Co. v. Engle*, 52 Md. 468. 1879.

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§ 70. Assured was allowed to prove, under objection, that he told people, who put up at his house, that he did not keep a hotel. *Held*, that this was conversation characterizing his act, and was proper to show in what way he received his guests. *Partridge v. Commercial Fire Ins. Co.* 17 Hun, 95. 1879.

§ 71. Policy provided that it should be void if "camphene, burning fluid, or refined coal or earth oils are used on the premises." *Held*, that whether kerosene oil was a coal or earth oil, could not be judicially noticed, or found without evidence. *Bennett v. N. B. & M. Ins. Co.* 8 Daly, 471. 1879. *Aff'd* 81 N. Y. 273.

§ 72. Evidence of what assured said when he bought the property, as to his intention to keep a hotel, is properly excluded, as it does not tend to show what he in fact did. *Partridge v. Commercial Fire Ins. Co.* 17 Hun, 95. 1879.

§ 73. Statement in proofs of loss of other insurance is sufficient proof of its existence. *Continental Ins. Co. v. Hulman*, 92 Ill. 145. 1879.

§ 74. Inspection by agent and agreement by him as to value is *prima facie* evidence of value. *Virginia Fire Ins. Co. v. Feagin*, 62 Ga. 515. 1879.

§ 75. When policy insures party upon "his interest as lessee," character and extent of such interest, as made known to agent of company on obtaining the insurance, is competent evidence, in connection with other facts, to show purpose and intent of the contracting parties. *Creighton v. Homestead Fire Ins. Co.* 17 Hun, 78. 1879.

§ 76. A carpenter qualified to testify as to value of a building in one place, is also qualified to testify as to value of same in another, it being shown that the difference is only matter of freight. *Hills v. Home Ins. Co.* 9 Ins. L. J. 814. Mass. 1879.

§ 77. Testimony of a witness was received in connection with books of his firm produced in court, containing

entries of sales made to assured, though witness had no personal knowledge of the sales of the goods charged, and did not himself make the entries, it being shown that the bills had been rendered to the assured and paid by him, and that duplicates could have been obtained if assured had applied for them. *Held*, admissible upon issue as to ability of assured to furnish duplicate bills as required under condition in the policy. *Mispelhorn v. Farmers' Fire Ins. Co.* 9 Ins. L. J. 411. 1879. Md.

§ 78. It is not error to exclude question to witness whether "an average clause in a policy is favorable or unfavorable to an insurance company." *Standard Oil Co. v. Amazon Ins. Co.* 79 N. Y. 506. 1880.

§ 79. Plaintiff was asked, "So far as you could individually, did you get these proofs of loss forwarded as soon as it was possible for you to do so?" Objected to, allowed, and exception. *Held*, competent. *Brink v. Hanover Fire Ins. Co.* 80 N. Y. 108. 1880.

§ 80. The daily report of company's agent is not admissible in evidence against the assured. *Thayer v. Providence Ins. Co.* 70 Me. 531. 1880.

§ 81. Some knowledge of cost or market value of building, acquired as dealer or builder, renders witness competent to testify as to value. The weight of such testimony is to be determined by the jury. *Woodruff v. Imperial Fire Ins. Co.* 83 N. Y. 133. 1880.

§ 82. Conversations with a solicitor or broker may be competent when there is other evidence from which it may be inferred that the substance of the same was communicated to the company's agent. *Fishbeck v. Phoenix Ins. Co.* 54 Cal. 422. 1880. *s. p. Batchelor v. People's Ins. Co.* 40 Conn. 56. 1873.

§ 83. When the question as to whether a misdescription in the policy was the cause of the insurance being obtained at a less rate than it would otherwise be subject to, it is permissible to ask the agent of the company upon a trial, "what were the usual rates about the time the

policy was issued upon the same kind of property?" and what he knew as to the actual rates charged at that time by other companies upon designated buildings, being of the same class. *Martin v. Franklin Ins. Co.* 13 Vroom, N. J. L. R. 46. 1880.

§ 84. Upon an issue of willful burning, evidence that property not covered by the insurance, belonging to the assured and near relatives, was destroyed by the fire, is admissible as bearing upon the improbability of burning by design. Evidence tending to show that assured had loose notions respecting the destruction of the property insured is admissible, the time when such statements were made affecting the weight of the testimony and not its admissibility. Evidence of statements made by assured as to his intention to go to another place, and object in going there, morning of day previous to fire, is admissible. *Farmers' Mutual Ins. Co. v. Crampton*, 9 Ins. L. J. 549 1880. Mich.

§ 85. Local agent testified that the general agent of defendant, a Mr. Little, was at location of the insured property after the fire, and then investigated the circumstances of the loss. Plaintiff then testified that about the same time a person called upon him, representing himself as Mr. Little, general agent of the defendant, and inquired about certain foreclosure proceedings and the fire, and they had a conversation upon the subject. He had never before seen Mr. Little, and all he knew about his identity was what he then learned from him. The issue being upon company's knowledge of the foreclosure proceedings, relied upon to effect an estoppel, company's counsel objected to the evidence as hearsay upon the ground that there was no sufficient proof of identity. *Held*, that it could not be assumed that the person was an impostor, and that it was for the jury to determine whether he was the identical Little. *Titus v. Glen's Falls Ins. Co.* 81 N. Y. 410. 1880.

§ 86. The testimony of an insurance expert that "companies would not insure unoccupied buildings on account of increased risk, and that a risk was regarded as

greater or less according to amount of insurance and value of the property" is incompetent. *Thayer v. Providence Ins. Co.* 70 Me. 531. 1881.

§ 87. When application is made part of the policy they *both* constitute the contract, and *both* must be proved, even although the former is in possession of the company. In such a case it is the duty of the plaintiff to require its production upon the trial by proper notice. *Farmers' Ins. Co. v. Meckes*, 10 Ins. L. J. 707. 1881. Pa.

§ 88. Evidence of custom is inadmissible unless it is shown that contract was made in reference to it. *Continental Ins. Co. v. Randolph*, 10 Ins. L. J. 387. 1881. Ky.

§ 89. Policy prohibited the use of camphene, spirit gas or any burning fluid or chemical oil. It was proved that kerosene was used. *Held*, that a court could not presume, in the absence of evidence, that kerosene is included in the words burning fluid. *Mark v. National Fire Ins. Co.* 24 Hun, 565. 1881.

§ 90. It is not error to admit testimony of the assured that he did not read the policy when it was delivered, as it has a tendency to show that he relied on the agent's acts. *Miaghan v. Hartford Fire Ins. Co.* 24 Hun, 58. 1881.

§ 91. Proofs of loss are evidence only of compliance with condition in policy. *Baile v. St. Joseph F. and M. Ins. Co.* 10 Ins. L. J. 657. 1881. Mo. When introduced by company to sustain defense of fraud and false swearing, they do not become evidence of the loss in favor of the assured. *Brown v. Clay Ins. Co.* 68 Mo. 133. 1878. *Semble*, duty of counsel in all cases to ask for an instruction limiting the evidence to purpose for which it is competent. *Williams v. Hartford Ins. Co.* 54 Cal. 442. 1880.

See Adjustment, § 7, 10. Agent, 17, 33, 74, 80. Burden of Proof, 1, 8. Burning by Design, 1, 8. By-Laws and Conditions, 2. Cancellation, 5, 18. Certificate, 5, 17. Construction, 3. Damages, 1, 12, 17. Distance Between Buildings, 1. Encumbrances, 15. Estoppel, 3, 17, 26. Foreign Company, 7. Goods in Trust, 8. Increase of Risk, 2, 20, 23, 25. Interest in Policy,

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19. Mortgagor and Mortgagee, 27, 37. Mutual Company, 3, 13, 33, 122. Notice of Loss, 17. Other Insurance, 15, 25. Over-valuation, 8. Parol contract, 8, 10, 12, 19, 22. Pleading and Practice, 16, 20, 21. Premium, 3, 22. Proofs of Loss, 13, 31, 70. Rebuild, &c., 7. Reformation, 1, 11. Renewal, 11. Storing and Keeping, 1, 5, 21. Title, 5, 21. Usage and Custom, 1, 2, 3, 5, 6, 9. Use and Occupation, 13. Vacant or Unoccupied, 6. Waiver, 1, 27, 40, 57. Warranty and Representation, 11, 12, 14, 65, 81, 93.

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## EXAMINATION UNDER OATH.

§ 1. Personal examination of assured is no part of the proofs of loss, so as to extend period for the loss becoming due and payable. *Winneshick Ins. Co. v. Schueler*, 60 Ill. 465. 1871.

§ 2. *Semble* that a demand made upon the party to whom the loss is made payable, that the assured shall submit to an examination, is sufficient to impose on him the duty of procuring the assured for that purpose. *State Ins. Co. v. Maackens*, 9 Vroom, N. J. L. R. 564. 1876.

§ 3. Mere informal conversation or declarations that company desires the assured to submit to an examination does not impose that duty upon him. The demand for an examination must be made with such clearness and distinctness that the party shall be fully informed that the company means to insist upon having it. *State Ins. Co. v. Maackens*, 9 Vroom, N. J. L. R. 564. 1876.

§ 4. Examination of assured by adjuster waives condition in regard to notice. *Badger v. Glen's Falls Ins. Co.* 49 Wis. 389. 1880.

§ 5. When policy provides that "assured shall submit to an examination or examinations under oath, and subscribe same when reduced to writing," assured is bound only to answer such questions as have a material bearing upon the insurance and the loss. If he declines to answer some of the questions put to him, and if an appellate

court cannot perceive that such questions have such bearing, it will assume that he was justified in his refusal to answer. *Titus v. Glen's Falls Ins. Co.* 81 N. Y. 410. 1880.

See *Estoppel*, § 4. *Payment of Loss*, 1. *Pleading and Practice*, 6. *Proofs of Loss*, 78, 79.

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## EXECUTIONS.

§ 1. Condition in policy providing that it should be void if property was levied upon or taken into custody by the law must be construed as meaning *rightful* levies. *Mills v. Ins. Co.* 5 Phil. Rep. 28. 1862.

§ 2. Condition provided that the insurance by this policy shall cease at the time that the property hereby insured shall be levied on or taken into possession or custody under any proceeding in law or equity. *Held*, that the proceedings under mechanics' lien law and issue of an execution and advertisement of the property for sale does not constitute a breach of the condition which has special if not exclusive reference to personal property which, when levied on, is usually seized in fact and remains in possession of the sheriff until it is sold. *Ins. Co. v. O'Malley*, 82 Pa. 400. 1876.

§ 3. Policy provided that it should be void "at and from the time property insured should be levied upon or taken into possession or custody under any proceeding in law or equity." *Held*, that a mere technical seizure, unaccompanied by any change of possession, or increase of risk, was not sufficient to avoid the policy. *Smith v. Farmers' Ins. Co.* 8 Ins. L. J. 828. 1879. Pa.

§ 4. Policy provided that insurance under it should cease at and from the time the property should be lev-

ied on or taken into possession or custody under any proceeding in law or equity, and should there during the life of the policy an encumbrance fall or be executed upon the property of insured, so as to reduce the real interest of the insured to a sum equal to or below the amount insured, and he neglects or fails to obtain consent of the company, then and in that case it should be void. *Held*, that a mere technical seizure on an execution unaccompanied by any show of opposition or increased risk was not sufficient to avoid the policy. Smith v. Farmers' and Mechanics' Mut. Fire Ins. Co. 89 Pa. 287. 1879.

§ 5. An illegal attachment does not avoid policy under condition that insurance should "cease from time property is levied on or taken into possession or custody under any proceeding in law or equity." Miami Valley Ins. Co. v. Stanhope, 10 Ins. L. J. 159. 1881. Ohio Dist. Court.

See Alienation, § 15, 17.

## EXPLOSIONS.

§ 1. When policy provides that company should not be liable for an explosion by gunpowder it must be construed to be applicable only to a fire originating from such an explosion in the building insured. When the latter is already burning and to prevent the spread of the flames in the absence of water, gunpowder is used to blow it up, company is liable. Greenwald v. Ins. Co. 3 Phil. Rep. 323. 1859.

§ 2. A condition excepting liability for damages by explosion includes an explosion of engine covered by the policy, although engine incidental and essential to the business. Hayward v. Liverpool, Lond. & G. Ins. Co. 2 Abb. Ct. App. Dec. 349. 1867.

§ 3. Policy provided that it should not be liable for damage occasioned "by the explosion of a steam boiler, nor from damage resulting from such explosion, nor explosions caused by gunpowder, gas, or other explosive substances." Fire resulted from an explosion of gas. *Held*, that the exemption from liability for damage occasioned by explosion was limited to the explosion of a steam boiler, and that the company was exempted from liability from the effect of the explosion only of the gas and was liable for the consequent damages by fire. *Boatman's Ins. Co. v. Parker*, 23 Ohio, 85. 1872.

§ 4. Policy provided that company should not be liable "for any loss or damage *by fire* caused by means of an invasion, insurrection, riot, &c., \* \* \* nor for any loss caused by the explosion of gunpowder, camphene, or any explosive substance, or explosion of any kind." *Held*, that, by construction, the latter clause did not except liability for losses *by fire* caused by explosion. *Commercial Ins. Co. v. Robinson*, 64 Ill. 265. 1872.

§ 5. Policy provided that the company should not be liable for loss caused by "explosions of any kind, unless fire ensues, and then for the loss or damage by fire only." Plaintiff was engaged in business of rectifying spirits. There was a small lamp standing in the building brought there by person repairing the machinery. Vapor from the works, coming in contact with the lamp caused an explosion which blew off the roof and blew down the walls and greatly injured the machinery. Soon after a fire started, but the damage by the fire was slight compared to that caused by explosion. Jury found the damage caused by each separately. *Held*, company not liable for amount of damage found to have been caused by the explosion. *Semble*, had the explosion occurred during the progress of a fire rule might be different. *Briggs v. N. B. and M. Ins. Co.* 53 N. Y. 446. 1873. *Aff'g 66 Barb.* 325. s. c. 5 Benn. F. I. C. 501; 2 Ins. L. J. 929.

§ 6. There is no presumption from a special premium charged for insuring an oil refinery that it was the intention of the contracting parties to exempt from the printed

exception the explosion risk; in such case it must be assumed that the parties intended special premium on account of extra hazard. *Smiley v. Citizens' Fire Ins. Co.* 14 W. Va. 33. 1878.

§ 7. Policy insured a petroleum refinery and contained usual condition providing that the company should not be liable for a loss occasioned by explosions of any kind. From the evidence of the only witness sworn as to the origin of the fire it appeared that he was standing in front of the boiler as the fireman was engaged in feeding it. Just as the fireman shut up the furnace door he saw something just like lightning strike. The line of light ran into the office, then back in the receiving-room, then the whole thing was on fire. The office did not take fire at first, but burned down afterwards. The stills of the refinery were running at the time. At the time the fire began there was no explosion at all. It burned about five minutes when explosions could be heard in the agitator and receiver. He saw the flash of fire first in the office as he was standing a little from the door, and from there it ran into the main building through the door in the brick wall, and then the whole of the inside of the main building took fire. He thought if the door in the brick wall had been shut, the fire would not have got in, but he could not get there soon enough to shut the door. *Held*, that the fire was not occasioned by an explosion. *Smiley v. Citizens' Fire Ins. Co.* 14 W. Va. 33. 1878.

§ 8. By the sudden combustion of inflammable gas an explosion took place in one of the upper stories of the building insured, which was of such force as to lift up the roof over the rear part of the building, to blow outward the larger portion of the walls on the two sides next the streets, and it caused the instantaneous fall of the whole roof. The interior partitions and contents of the rooms, including a stove with a coal of fire burning therein, fell in a mass of ruins upon the assured's shop in the lower story. Immediately after the explosion and fall, the fire caused thereby broke out in the fall and ruins and destroyed the property of the insured. Policy contained usual provision

making it liable for the damage caused by fire after an explosion, and also, in addition, the following: "If a building shall fall, except as the result of a fire, all insurance by this company on it or its contents shall immediately cease and determine." *Held*, that this last provision did not include the case of the destruction of a building by an explosion within the building itself and of a fire immediately ensuing upon and connected with such an explosion. *Dows v. Faneuil Hall Ins. Co.* 127 Mass. 346. 1879.

§ 9. Policy provided that company should not be liable for loss caused by explosion of gunpowder, &c., or "any other explosive substance," except only such loss from fire that may ensue therefrom; "nor shall the company be liable for any loss by such fire, unless privilege shall have been given in the policy to keep such articles," &c. *Held*, that this condition had no reference to flour dust, which, while an explosive substance, was not within the meaning of the term as used in the policy in reference to "keeping." *Washburn v. Ins. Cos.* 9 Ins. L. J. 761. 1880. U. S. Circuit, Ohio. And see *Washburn v. Western Ins. Co.* 9 Ins. L. J. 424. 1880. U. S. Circuit, Ohio.

§ 10. When policy provides that company shall not be liable for a loss caused by an explosion of any kind unless fire ensues, and then for the loss or damage by fire only, company's liability under the policy is not modified when it is shown that the explosion followed the fire and was an incident of it. *Washburn v. Ins. Cos.* 9 Ins. L. J. 761. 1880. U. S. Circuit, Ohio. *Washburn v. Artisans' Ins. Co.* 9 Ins. L. J. 68. 1879. U. S. Circuit, Pa. *Washburn v. Western Ins. Co.* 9 Ins. L. J. 425. 1880. U. S. Circuit, Ohio.

See Increase of Risk, § 28.

## FALLING BUILDING.

§ 1. Building must cease to be such to be "fallen" within meaning of the policy. So long as standing, however depreciated, it is not fallen. Firemen's Ins. Co. v. Sholom, 80 Ill. 558. 1875.

§ 2. Where a portion of building falls, leaving three-fourths still standing, it cannot be deemed a "fallen building," terminating the insurance. Breuner v. Liv., Lond. & Globe Ins. Co. 51 Cal. 101. 1875.

§ 3. The policy contained provision that "if building shall fall, except as the result of a fire, all insurance on it or its contents, shall immediately cease and determine." The eastern and western halves of the insured building were substantially distinct, separated from each other by a brick partition which extended from the front to the rear and from cellar to roof, though with doors of communication in each story, and each of the two parts or buildings were capable of standing or falling by itself. In each of these two parts or buildings midway between the partition wall and the end wall there was a beam or girder in each floor, extending from the front to the rear, supported by four brick piers in the cellar and by wooden posts in each story, and upon which the beams of the floors rested. By the giving way of the piers of the cellar in the eastern part or building, without the agency of fire, the beam or girder resting thereon fell down near the ground, bringing with it the floors and partitions and roof above, with the goods and merchandise in each story, in a mixed and confused mass, excepting only very small portions of some of the floors and of the roof and a single case of goods. Only the outer walls of this building, of which the brick partition walls separating it from the adjoining building was one, and an elevator five feet square in one corner, were uninjured by the fall. After the fall the fire broke out which caused the injury, for which recovery was sought in this action, to the goods which had fallen, and to

the elevator and to the surrounding walls, with the doors and windows therein, which remained standing. The west half of the building remained, in all its parts, undisturbed and uninjured. *Held*, that action could not be maintained, and that there must be judgment for defendant. *Huck v. Globe Ins. Co.* 127 Mass. 306. 1879.

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## FRAUD AND FALSE SWEARING.

§ 1. Circumstances in connection with the origin of the fire being suspicious, a false statement by the assured in his proofs as to his absence from the premises at the time of the fire, avoids the insurance. *Smith v. Queen Ins. Co.* 1 Hannay, N. B. 311. 1868.

§ 2. Difference between amount of verdict and value, as sworn to in the proofs and on the trial, does not of itself establish fraud. *Williams v. Phoenix Ins. Co.* 61 Me. 67. 1869. *Unger v. People's Ins. Co.* 4 Daly, 96. 1871. *Gerhauser v. Mercantile Ins. Co.* 7 Nev. 174. 1871. *Rockford Ins. Co. v. Nelson*, 75 Ill. 548. 1874. *Israel v. Teutonia Ins. Co.* 28 La. Ann. 689. 1876. *Schulter v. Merchants' Mut. Ins. Co.* 62 Mo. 236. 1876. *Dogge v. Northwestern Nat. Ins. Co.* 49 Wis. 501. 1880.

§ 3. To constitute fraud and false swearing a statement must be willfully made in respect to a material matter and with intent to deceive the insurer. *Gerhauser v. N. B. & Mercantile Ins. Co.* 7 Nev. 174. 1871. *s. p. Huchberger v. Merchants' Ins. Co.* 4 Biss. 265. 1868. *Id. v. Home Ins. Co.* 5 Id. 106. 1870. *Jones v. Mechanics' Fire Ins. Co.* 7 Vroom, N. J. L. R. 29. 1872. *Planters' Mut. Ins. Co. v. Deford*, 38 Md. 382. 1873. *Parker v. Amazon Ins. Co.* 34 Wis. 363. 1874. *Little v. Phoenix Ins. Co.* 123 Mass. 380. 1877. *Gibbs v. Continental Ins.*

Co. 13 Hun, 611. 1878. Titus v. Glen's Falls Ins. Co. 81 N. Y. 410. 1880.

§ 4. Defense was misrepresentation in stating value to be \$4,500; false swearing in stating value was \$3,206; the amount insured was \$1,800, upon an estimated value at the time of the insurance of \$4,500. Jury found specially, first, that the actual cash value of the goods at the time of the insurance was \$1,000, and that the extent of the loss amounted to \$1,100. *Held*, that upon these facts defendant was entitled to succeed and plaintiff nonsuited. Newton v. Gore District Mut. Fire Ins. Co. 33 Up. Can. Q. B. 92. 1872.

§ 5. Under the charge of fraud and false swearing accused cannot excuse himself for including in his sworn account of the loss, property which had been removed by him from the premises before the fire, upon an alleged statement made by the company's agent, to "put into the proofs all the plaintiff had; that there was a deduction to be made by the company anyway;" the agent not knowing of the removal of the goods. Hanover Ins. Co. v. Mannasson, 29 Mich. 316. 1874.

§ 6. There can be no designed deception in proofs of loss when company's agent is fully advised of the facts. Nor can an incorrect statement which cannot, and does not, mislead, be construed as fraud or an attempt at fraud. Rohrbach v. Aetna Ins. Co. 62 N. Y. 613. 1875.

§ 7. When agent knows facts, an incorrect statement in proofs cannot be construed as "fraud and false swearing." Maher v. Hibernia Ins. Co. 67 N. Y. 283. 1876. s. p. Young v. Hartford Ins. Co. 45 Iowa, 377. 1877.

§ 8. When the assured swears in his proofs that the value of the property insured was \$1,000, knowing at the time that it was materially less than such sum, actually believing his loss to be at least \$600, for the purpose of inducing a speedy settlement and to prevent controversy, it constitutes fraud or attempt at fraud, causing forfeiture of the policy. Sleeper v. N. H. F. Ins. Co. 56 N. H. 401. 1876.

§ 9. When assured had claimed that property destroyed was worth \$2,000, and the evidence upon the trial convinced the court that the real value, when new, was not more than \$1,000, and that, at the time of the fire, did not exceed \$500—*Held*, that, notwithstanding a verdict had been given once before in favor of the plaintiff, it must be set aside. *McLeod v. Citizens' Ins. Co.* 1 *Russel & G. N. S.* 21. 1879.

§ 10. If assured includes in sworn statement of loss or proofs, articles not covered by the insurance, but which is done in good faith under his mistaken idea as to liability of the company, it does not constitute fraud and false swearing. *Farmers' Ins. Co. v. Gargett*, 9 *Ins. L. J.* 108. 1879. Mich.

§ 11. Jury found special verdict that loss was "overestimated, but not with intention of fraud." There was evidence of a co-plaintiff implicating assured in the destruction of the property, and as having intentionally made a false and fraudulent claim. The verdict was for \$400. Claim had been made for \$565. *Held*, the verdict must be set aside. *Longley v. Northern Ins. Co.* 3 *Russel & C.* 516. 1879.

§ 12. The insertion in proofs by assured, in good faith, with knowledge of the company, of articles of property belonging to other members of his family, and not covered by the insurance, does not constitute fraud. *Farmers' Mut. Ins. Co. v. Gargett*, 42 Mich. 289. 1879.

§ 13. To sustain defense of fraud and false swearing in relation to title, it is necessary to show that the assured had not an absolute title at the time of the loss; that he knowingly, falsely and fraudulently asserted, at the time of making a settlement, and for the purpose of inducing the defendant to make the same, that he had a perfect title; that the defendant, relying upon such false assertion of title, was, in fact, induced to make the settlement alleged to have been made, and that defendant would not have made such settlement if such false reports had not been made. *Stache v. St. Paul Fire Ins. Co.* 49 Wis. 89. 1880.

§ 14. Fraud cannot be inferred from a discrepancy in statements as to value in application and proofs. *Heibing v. Svea Ins. Co.* 54 Cal. 156. 1880.

§ 15. The fact that assured, in his proofs, stated that his damages amounted to \$1,017 64, and appraisers estimated same at \$694, is not conclusive evidence of fraud. The question, in such a case, is properly left to the jury. *Dolan v. Aetna Ins. Co.* 22 Hun, 396. 1880.

See *Entirety and Divisibility of Policy*, § 1, 6. *Evidence*, 10. *Pleading and Practice*, 8. *Waiver*, 1.

## FOREIGN COMPANY.

§ 1. Under L. 1849, ch. 178, as amended by 2 L. 1857, ch. 548, agent of foreign company, in any city or incorporated village, except New York, must give bond for accounting and payment of two per cent. upon the amount of premiums annually received, to representative of fire department. *Fire Department of Troy v. Bacon*, 2 Abb. Ct. App. Dec. 127. 1867.

§ 2. The deposit of securities made by a foreign insurance company, is applicable only for the security of policy-holders. General creditors of the company cannot share in such deposit. *Re Aetna Ins. Co.* 17 Grant Ch. 160. 1870.

§ 3. When, in distribution of securities or deposit made by a foreign insurance company, the assets prove to be deficient, the costs are added to the claims, and are proved and paid as part of it. *Re Aetna Ins. Co.* 17 Grant Ch. 160. 1870.

§ 4. When party holds himself out as agent of a foreign company, and forwards an application to a broker in Boston, who obtains policy from a company in New York,

and delivers it to the former, who delivers it to the assured and receives a note for the premium, *Held*, that the transaction was an indirect carrying on of insurance business contrary to statute, and that such note could not be collected. *Jones v. Taylor*, 2d Pugsley, N. B. 391; and see *Id.* 103.

§ 5. Under the Act of March 26, 1868, creating the office of insurance commissioner for the State of California, such officer may require an insolvent company to repair its capital, without revoking its certificate. *Palache v. Pacific Ins. Co.* 42 Cal. 418. 1871.

§ 6. In an action against a foreign insurance company it is not necessary to aver that it has complied with statute governing its admission to the State and authority to do business. *Germania Ins. Co. v. Curran*, 8 Kans. 9. 1871.

§ 7. Section 5, Act Feb. 13, 1863 (Ill.), providing in substance that foreign insurance companies should pay two per cent. on premiums received in Chicago to the city treasury, was repealed by section 30, Act March 10, 1869, and that on account of such repeal the city lost its right to the percentage accrued at time of passage of repealing act, but not enforced. That the court could not take judicial notice of the existence of a fire department in Chicago to bring the case within a proviso of the repealing act. *Van Inwagen v. City of Chicago*, 61 Ill. 31. 1871.

§ 8. Under Constitution of the State (La.), Act 118, an insurance company is not obliged to pay more than one license fee. *Merchants' Mut. Ins. Co. v. Blandin*, 24 La. Ann. 112. 1872.

§ 9. An insurance company which has not complied with the statute governing its admission to the State, has no right to ask any relief or require any official action in its favor within such State. *People v. Com. of Ins.* 25 Mich. 321. 1872.

§ 10. A policy of insurance delivered by a broker within the State, who receives premium therefor, of a

foreign company which has not complied with statute governing its admission to State, cannot be enforced in courts of such State. Franklin Ins. Co. v. Louisville Packet Co. 9 Bush (Ky.), 590. 1873.

§ 11. The funds and securities deposited by a foreign insurance company with the State Treasurer is not liable to attachment when the company ceases to do business within the State and has satisfied all the claims of its citizens; such funds must be returned to the company and cannot be attached in an action brought by a foreign creditor. Rollo v. Andes Ins. Co. 23 Grat. 509. 1873.

§ 12. Funds and securities deposited by a foreign insurance company with a specified officer of this State are not attachable both on account of the tenure of the holding and of the official character of the holder. A lien may be acquired on such a fund, but no priority. The law under which such securities are deposited is equivalent to a statutory mortgage for the benefit of all the citizens of the State. In such a case the rule is that the creditors share *pro rata* and neither can require any priority over the others. Pennebaker v. Tomlinson, 1 Cooper, ch. 111, 594. 1873.

§ 13. A foreign corporation must comply with a statute prescribing the conditions upon which it will have authority to transact business within the State. Farmers' Ins. Co. v. Harrah, 47 Ind. 236. 1874. s. p. Doyle v. Continental Ins. Co. 6 Ins. L. J. 177. 1876. U. S. Sup.

§ 14. Under the Indiana statute (3 Ind. Stat. 315) a foreign company cannot insist upon certificate of nearest officer. Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315. 1874.

§ 15. Statute must be strictly followed to obtain jurisdiction over foreign insurance companies. Hartford Fire Ins. Co. v. Owen, 30 Mich. 441. 1874.

§ 16. The city of Norfolk has power to impose a license tax upon foreign insurance companies doing busi-

ness within the limits of that city. *Humphreys v. City of Norfolk*, 25 Grat. 97. 1874.

§ 17. The lien upon notes deposited with the State officer as a "security" for risks taken by citizens of this State may be enforced by an assignee who resides without the State. It is the risk that secures the lien. If that be taken by a citizen it is a matter of no consequence whether the citizens retain the claim after it becomes fixed by the fire or has assigned it. *Pennebaker v. Tomlinson*, 1 Cooper, ch. 111, 598. 1874.

§ 18. A contract of insurance made in Pennsylvania on property situated in New Jersey, which would be void under the laws of the former State, is valid and will be enforced in New Jersey. *Columbia Fire Ins. Co. v. Kin-yon*, 8 Vroom, N. J. L. R. 33. 1874.

§ 19. An insurance company organized as a corporation under laws of one State, and having an agency by which it conducts its business in another State, is not engaged "in commerce between the States," within meaning of U. S. Constitution. *Farmers' Ins. Co. v. Harrah*, 47 Ind. 236. 1874.

§ 20. A foreign corporation being a creature of local law, must dwell in place of its creation. It has no absolute right to recognition in other States without their assent, it follows that such assent may be granted on such conditions as may be imposed by statute. *Lamb v. Lamb*, 6 Biss. 420. 1875. *s. p. Hartford Ins. Co. v. State*, 9 Kans. 210. 1872. *Home Ins. Co. v. Davis*, 29 Mich. 238. 1874. *City Leavenworth v. Booth*, 15 Kans. 627. 1875. *Walker v. City of Springfield*, 94 Ill. 364. 1880.

§ 21. A statute prohibiting removal of suits into U. S. court having been decreed unconstitutional, one of its provisions requiring Secretary of State in such case to revoke license is no longer operative, and he may at the instance of a company be restrained by injunction. *Hartford Fire Ins. Co. v. Doyle*, 6 Biss. 461. 1875.

§ 22. A statute which requires a foreign insurance company, as a condition precedent to its right to transact and carry on business within the State, to waive all claim or right of removal of actions against it into the United States court, is unconstitutional and void. *Railway Passenger Assurance Co. v. Pierce*, 27 Ohio, 155. 1875. *Contra*, *Home Ins. Co. v. Davis*, 29 Mich. 238. 1874.

§ 23. Comp. L. § 1,683 (Mich.) governing insurance by agents of foreign corporation, applies to operations within the State and against the representatives of foreign incorporated and unincorporated interests. It does not assume to forbid the making of contracts of insurance in another State, nor does it assume to invalidate such agreements. A company sued upon a policy issued in another State, and which has not complied with the statute, cannot avail itself of a defense founded upon such non-compliance, upon the ground of want of authority to make its contract. *Clay Ins. Co. v. Huron Manuf. Co.* 31 Mich. 346. 1875.

§ 24. The common council of St. Paul, Minnesota, has no authority to require an agent of an insurance company to pay for a license to transact insurance business in that city. *Moss v. City of St. Paul*, 21 Minn. 421. 1875.

§ 25. When a foreign fire insurance company has, under the statute (L. 1853, p. 915; L. 1862, p. 65), appointed an attorney upon whom process of law can be served, service of a summons upon such attorney as prescribed by the Code of Civil Procedure, is sufficient to give the State courts jurisdiction. *Gibbs v. Queen Ins. Co.* 63 N. Y. 114. 1875.

§ 26. A foreign insurance company which has complied with the statute in regard to its admission into the State, and has appointed an agent to accept process, becomes, as to all contracts with citizens of such State, domiciled there, and in controversies with other citizens, growing out of policies of insurance, must sue and be sued in the State courts, and does not come within the terms of the Act of Congress relating to the removal of cases to the

United States court. Continental Ins. Co. v. Kasey, 27 Grat. 216. 1876.

§ 27. The fact that statute under which an agreement is required not to remove causes into the United States court is unconstitutional and void, does not prevent State from revoking its authority and license to a foreign company to transact business within the State. Doyle v. Continental Ins. Co. 6 Ins. L. J. 177. 1876. U. S. Sup.

§ 28. Authority in a municipal charter to license and tax insurance companies for a specific purpose in connection with fire department, cannot be extended to create a fund for benefit of department generally. City of Alton v. Aetna Fire Ins. Co. 82 Ill. 45. 1876.

§ 29. Although company may not have complied with laws of a certain State authorizing it to do business therein, such fact does not make its policy void, having been issued in another State upon an application forwarded by mail. Lamb v. Bowser, 7 Biss. 315. 1876.

§ 30. Superintendent of New York Insurance Department cannot voluntarily transfer his trust created by deposits made with him under the statute for benefit of policy holders. Ruggles v. Chapman, 59 N. Y. 163. 1874. 64 N. Y. 557. 1876.

§ 31. The State Act of 1875 which authorizes the treasury department to collect from foreign insurance companies two dollars and fifty cents upon each one hundred dollars of premiums, "which shall be in lieu of all other taxes," prevents the city of Memphis from imposing any further tax. City of Memphis v. Ins. Cos. 5 Ins. L. J. 175. 1876. Tenn.

§ 32. Jurisdiction in garnishee proceedings is obtained over foreign companies only by a strict compliance with the statute. Hebel v. Amazon Ins. Co. 5 Ins. L. J. 599. 1876. Mich.

§ 33. To acquire jurisdiction over a foreign insurance company, service of process must be made upon the per-

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son or agent designated for that purpose under the statute. *Liblong v. Kansas Fire Ins. Co.* 82 Pa. 413. 1876.

§ 34. It is not competent for a legislature to declare that the citizens of the State shall not be allowed to make such contracts as they please out of the State for the insurance of their property. *Lamb v. Bowser*, 7 Biss. 315. 1876.

§ 35. The non-compliance by a foreign insurance company with statute governing its admission to State, does not prevent a recovery upon a note given by a citizen of such State as subscription to capital stock. *Bartlett v. Chouteau Ins. Co.* 18 Kans. 369. 1877.

§ 36. In Iowa service of process may be made upon an agent authorized to solicit risks and forward them to the company. *Farmers' Ins. Co. v. Highsmith*, 44 Iowa, 330. 1876. And neglect of such agent to forward papers to company will not induce court to vacate a judgment entered upon default. *Niagara Ins. Co. v. Rodecker*, 47 Iowa, 162. 1877.

§ 37. Under the Iowa statute, service of process upon company admitted to the State may be made upon any of its agents in the State. Company will not be relieved from a judgment obtained against it by default, process having been served on one of such agents, in absence of evidence that the latter used due diligence to notify the company or its general agent. *Niagara Ins. Co. v. Rodecker*, 7 Ins. L. J. 824. 1877. Iowa.

§ 38. A foreign insurance company cannot be allowed to continue business after legal proceedings have been had in its domicile for purpose of closing the affairs of the company, and it is without regard to the possible result of such proceedings upon the solvency of the company. *Douglas v. Atlantic Mutual Life Ins. Co.* 25 Grant Ch. 379. 1878.

§ 39. An insurance company created by Act of Congress is a foreign corporation within the meaning of stat-

ute of Indiana. (1 R. S. 1876, p. 373.) *Daly v. National Life Ins. Co.* 64 Ind. 1. 1878.

§ 40. Under the Indiana statute (1 R. S. 1876, p. 594) a company has until the last day of the months of January and July in each year to file certificate of authority, and may transact business until close of such months. *American Ins. Co. v. Pettijohn*, 62 Ind. 382. 1878.

§ 41. State Treasurer is not required to give up securities deposited with him by foreign insurance company until full compliance is shown with Act of March 23d, 1874. *State v. Richmond Fire Association*, 67 Mo. 496. 1878.

§ 42. A company having under the statute appointed an attorney for the purpose of receiving service of legal process, such service to confer jurisdiction, can be made upon such person only. *Baile v. Equitable Fire Ins. Co.* 68 Mo. 617. 1878.

§ 43. The right of a company organized under a special charter to transact business in Chicago with a capital less than \$150,000, is not affected by section 6 of ch. 73 Rev. Stat. 1874. *People v. Empire Fire Ins. Co.* 88 Ill. 309. 1878.

§ 44. In a controversy between various parties as to their interest in the fund deposited under the statute with the treasurer of the State of Mississippi, *Held*, that the object of the statute was to give foreign insurance companies as far as possible the privileges coupled with the liabilities of companies chartered by that State. That the deposit was intended only for those who obtained their policies through agents appointed and doing business in the State, under the provisions of the statute. That no assignment or transfer of the fund deposited could be made so as to defeat claims upon it for satisfaction of losses or unearned premiums upon policies issued by such agents as provided by statute. Nor could powers of such agents be worked so as to defeat such claims. After all such demands are satisfied the fund should be returned to the depositor or

its assignee. Firemen's Ins. Co. v. Hemingway, 8 Ins. L. J. 520. 1878. U. S. Circuit, Miss.

§ 45. State court has jurisdiction over a foreign company when process is served as prescribed by the statute in an action brought upon a policy issued and made within the State to a non-resident. Osborne v. Shawmut Ins. Co. 51 Vt. 278. 1878.

§ 46. The act of 1869 (Ga.) prescribing conditions under which foreign insurance companies may be authorized to transact business in that State is inoperative to sustain the impression of a tax upon a company when such company is from a State in which no Georgia company is engaged in business. Goldsmith v. Home Ins. Co. 62 Ga. 379. 1879.

§ 47. The act of 1869 of Georgia in substance provided that if any other State should require Georgia companies or their agents to pay taxes, penalties, &c., greater than the amounts required by the Laws of Georgia, that the companies of such other States should be required to pay a like amount to the comptroller-general. *Held*, that the comptroller-general could not under this act impose a tax for purpose of raising revenue; that the object of the act was to prescribe the terms upon which foreign companies might do business. Home Ins. Co. v. Goldsmith, 8 Ins. L. J. 811. 1879. Ga.

§ 48. State constitution provided that the tax upon insurance interests should be "uniform as to the class upon which it operates." When a municipal corporation imposes a tax it is not essential that it should apply equally to all insurance companies. Home and foreign companies constitute different classes. Hughes v. City of Cairo, 8 Ins. L. J. 909. 1879. Ill.

§ 49. A premium note executed within this State (Ind.) to a foreign insurance company which has not complied with the statute, is not absolutely void but the remedy is suspended until the company complies with the law. American Ins. Co. v. Wellman, 69 Ind. 413. 1879.

§ 50. Statute, sec. 1,974 R. S. which provides that if a judgment shall remain unpaid 60 days after its rendition, that the commissioner should revoke the authority of foreign insurance company to do business within the State, does not apply when company has taken an appeal in good faith from such judgment. *State v. Spooner*, 47 Wis. 438. 1879.

§ 51. An insurance company which has deposited stocks and securities with the treasurer under Gen. Stat. R. I. ch. 143, sec. 18, has no absolute right to receive and collect the interest and dividends accruing thereon but can only receive and collect them by permission of the treasurer. *Moies v. Mechanical Mutual Ins. Co.* 12 R. I. 259. 1879.

§ 52. Under the Wisconsin statute a broker, who solicits insurance for companies not authorized to transact business in that State, is liable to a penalty "not exceeding five hundred dollars, nor less than fifty dollars for each offense," and the fact that solicitation is made in behalf of a number of companies at same time and in same conversation does not relieve the broker from being subjected to as many penalties in one suit as there are companies. *State of Wisconsin v. Farmer*, 9 Ins. L. J. 515. 1880. Wis. And see *State v. Beazley*, 60 Mo. 220. 1875.

§ 53. A non-resident may sue company in Maryland State courts, after it has withdrawn from the State, by service of process on the insurance commissioner as provided by statute. *Ben. Franklin Ins. Co. v. Gillett*, 9 Ins. L. J. 774. 1880. Md.

§ 54. Suit was for a penalty of \$10 imposed on company's agents by city of Mobile for violation of ordinance requiring license for transacting business in that city. The appellants were agents of the Columbus Insurance Company of Mississippi. The laws of that State require foreign companies to pay a license tax of \$1,000 to be received in lieu of all other taxes or licenses, which are pro-

hibited to be exacted by any municipal authority. The statute of Alabama requires foreign companies to pay a license of \$100, and it is further provided "Whenever the existing or future laws of any State of the United States shall require of insurance companies incorporated by laws of this State, or of the agents thereof, any deposit of securities in such State for the protection of policy holders or otherwise, greater than the amount required for similar purposes from similar companies of other States by the then existing laws of this State, then in every such case, all companies of such States, establishing or having heretofore established an agency or agencies in this State, are required to make the same deposit for a like purpose with the treasurer of this State, for taxes, fines, penalties, license fees, or otherwise, an amount equal to the amount of such charges and payments imposed by the laws of such State upon the companies of this State, and the agents thereof." Company accordingly deposited \$1,000 with the treasurer of Alabama, and claimed that by above statute they were exempted from liability to pay license tax imposed. *Held*, that the statute quoted above was unconstitutional (1) because it violated clauses of constitution having reference to uniformity of taxation required in assessing property and (2) that in effect it authorized Mississippi to fix by law the amount which Alabama should demand of foreign companies and that thus it violated principle of constitutional law that "the power conferred on the legislature to make laws cannot be delegated to any other body or authority." Statute being void agents were liable to tax imposed. *Clark v. Mobile*, 10 Ins. L. J. 357. 1880. Ala.

§ 55. A premium note cannot be held to be void on the ground that the company has not complied with the statute when such non-compliance is entirely owing to the failure of the State officer to furnish the company's agent with a certified copy of a paper required by the statute. *American Ins. Co. v. Butler*, 70 Ind. 1. 1880.

§ 56. Company cannot plead non-compliance with statute governing its admission to the State as a defense

to an action upon its contract or policy. *Swan v. Watertown Ins. Co.* 10 Ins. L. J. 392. 1881. Pa. *s. p. Daniels v. Citizens' Ins. Co.* 11 Rep. 420. 1881. U. S. Circuit, Ind. *Watertown Fire Ins Co. v. Simons*, 9 Ins. L. J. 597. 1880. Pa.

See Agent, § 78, 95. Mutual Company, 19, 93, 104, 114, 152, 158. Other Insurance, 48. Parol Contract, 22. Removal of Causes to U. S. Court, 1.

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### GARNISHMENT OR TRUSTEE PROCESS.

§ 1. An unadjusted and unliquidated claim for a loss is subject to attachment. *Girard Fire Ins. Co. v. Field*, 3 Grant Cas. 329. 1862.

§ 2. Service of process in garnishee proceedings must be made at the usual place of business or residence of agent. *Lehigh Valley Ins. Co. v. Fuller*, 6 Ins. L. J. 486. 1877. Pa.

§ 3. A claim under policy of insurance is not liable to garnishment so long as the company has the option of paying for the property lost or replacing it. *Elliott v. Preston*, 42 Mich. 511. 1880. *Godfrey v. Macomber*, 128 Mass. 188. 1880. *Martz v. Detroit Ins. Co.* 28 Mich. 201. 1873.

See Foreign Company, § 11, 12, 82. Mutual Company, 159.

## GOODS IN TRUST OR ON COMMISSION.

§ 1. Policy insured "goods in trust or on commission for which they, the assured, are responsible." Assured had purchased the teas insured from an importer who indorsed to them the warrant in blank. Before the fire occurred assured had resold the teas to customers and had been paid for the same; the assured held, however, the warrants on behalf of such customers but merely for the convenience of paying, if required, expenses necessary to clear the teas and payable by such customers. *Held*, that as the property in the teas had passed out of the assured and that the teas remained at purchasers' risk and not at the risk of the assured, who no longer had any interest in them, are responsible to the purchasers in respect to them in case of the fire, and that such teas were therefore not covered, although *semel* it might have been otherwise if the insurance had extended to goods in trust or on commission generally, and instead of being expressly limited to goods in trust or on commission for which the assured were responsible. North British Ins. Co. v. Moffatt, L. R. 7 C. P. 25. 1871.

§ 2. By "goods held in trust" are meant goods with which assured is intrusted in ordinary sense of the word. Hough v. People's Ins. Co. 36 Md. 398. 1872.

§ 3. A warehouseman having complied with his agreement in procuring insurance on goods stored with him is not liable to the owner for the value of a portion held to be not covered by such insurance, owing to act of the owner in terminating the agreement to insure as to such portion prior to the fire. Cole v. Favorite, 69 Ill. 457. 1873.

§ 4. A trustee having agreed to insure, the selection of the company being left to him, does not guarantee their continued solvency. Gettins v. Scudder, 71 Ill. 86. 1873.

§ 5. Assignee of insolvent debtor had used due diligence in making sales and the bulk of the goods had been disposed of. There was a remnant unsold which he stored for the purpose of disposing of to best advantage and without delay. *Held*, that, in absence of testimony to contrary, assignee could not be charged with negligence in omitting to insure a parcel of goods of that character held under such circumstances so as to render him liable. *Clark v. Craig*, 29 Mich. 398. 1874.

§ 6. When assured holds policy "on merchandise his own or held by him in trust or on commission," he is entitled to the whole amount of insurance from the company, but as to the sum so received in excess of what is required to satisfy his individual claim, he is trustee for the actual owners. He has same lien upon the insurance money for advances as he had upon the goods. *Johnson v. Campbell*, 120 Mass. 449. 1876. *Hough v. People's Ins. Co.* 36 Md. 398. 1872. *Home Ins. v. Balt. Warehouse Co.* 3 Otto, 527. 1876. *Robbins v. Firemen's Fund Ins. Co.* 16 Blatch. 122. 1879. *Reitenbach v. Johnson*, 129 Mass. 316. 1880.

§ 7. An insurance of goods consigned which fails through neglect of consignee or factor, renders the latter liable to the consignor. *Gordon v. Wright*, 29 La. Ann. 812. 1877.

§ 8. Where a plaintiff bases right of recovery in an action for money had and received upon the ground that defendant who was bailee of plaintiff's piano, effected insurance on it, and piano having been destroyed by fire, afterward collected the money from the insurer, which he failed to pay over, plaintiff must not only show that the particular piano was covered by the insurance, but also that the defendant received money for its loss. If property was described in policy as "goods held in trust," defendant may show that the goods referred to were those which he was bound to insure and other than the piano. So defendant may show that proofs of loss did not include the piano, and that nothing, in fact, was paid for it.

Parol evidence that the insurance was effected on the goods he was under obligation to insure, is not objectionable on ground that it varies or contradicts the written contract; such evidence gives application to general words of the policy. The rule excluding parol evidence applies only to the parties to a written instrument. *Snow v. Stoutz*, 7 Ins. L. J. 483. 1877. Ala.

§ 9. Assured in policy covering goods left for sale or rent, and described as "his own or held by him in trust," holds the money collected as trustee, and cannot insist upon its being first applied in satisfaction of his individual claim. The insurance money belongs to each owner equally, and if less than the actual loss, must be divided. Knowledge and satisfaction of the obtaining of the policy not essential to sustain claim to share in the proceeds of the insurance. *Snow v. Carr*, 61 Ala. 363. 1878.

§ 10. Whether goods are owned by the assured or held by him for sale on commission is a question for determination of jury under proper instructions. *Planters' Mut. Ins. Co. v. Engle*, 52 Md. 468. 1879.

See Contribution, § 5, 16. Interest in Policy, 5, 19. What Property is Covered, 1, 24.

## ILLEGALITY OF CONTRACT.

§ 1. A contract of insurance made on Sunday is void, there being no evidence of a subsequent ratification. *Heller v. Crawford*, 37 Ind. 279. 1871.

§ 2. A policy which covers future material of production of the assured in the course of his business, trade or calling, is a valid contract of indemnity, and not a wager policy. *Sawyer v. Dodge County Mutual Ins. Co.* 37 Wis. 503. 1875.

§ 3. When assured is engaged in an unlawful business without a license required by the statute at the time of the issue and his acceptance of the policy, it never attaches; the whole policy is void notwithstanding it is divided into several items, one of which only relates to the illegal business. *Johnson v. Union Ins. Co.* 127 Mass. 555. 1879.

§ 4. Policy covered stock of drugs, medicines, liquors, &c. Company claimed that the contract and claim under it embraced liquors kept for sale contrary to law, and that by reason of such illegality policy was void. There was evidence tending to show that the assured illegally sold liquors, including those not used in compounding medicines. *Held*, that if such illegal traffic was the business of the assured, and his legal traffic, and transaction with other property a mere cover, ostensibly carried on for the purpose of enabling him to secrete and disguise his unlawful acts, the policy would be void; but if he carried on business using alcoholic liquors legitimately in his drug trade, and occasionally sold them in violation of law, if no illegal design entered into the making of the contract in its inception, it is so far collateral to the illegal acts, that latter cannot operate to render the insurance void. That the question should be determined by the jury with preceding instructions. *Carrigan v. Lycoming Ins. Co.* 10 Ins. L. J. 606. 1881.

See Foreign Company, § 4, 10, 29, 34, 40.

## INCREASE OF RISK.

§ 1. Ceasing to occupy the premises insured does not as a matter of law increase the risk. *Foy v. Aetna Ins. Co.* 3 Allen, N. B. 29. 1854.

§ 2. When two adjoining stores are thrown into one by making archways through the walls which remain open and are not provided with doors, such alteration affords a strong presumption that the risk is thereby increased, and if witnesses called on the part of the defendant are distinct and unanimous that such an alteration tends to produce such effect, and if no testimony is adduced on this point by the plaintiff, a verdict in his favor will be set aside. *Denkla v. Ins. Co.* 6 Phil. Rep. 233. 1867.

§ 3. Policy was to be void by "any increase of risk." Assured boarded up the windows and voluntarily permitted the building to remain unoccupied for several months before the fire. Trial judge refused to charge the jury "that if under this policy plaintiff might have recovered even for the consequences of the acts of vicious or bad tenants, yet he cannot recover if the building was wholly unoccupied for so long a time as to render the risk greater than it would have been with tenants of ordinary care and habits." *Held*, such refusal error; that defendant was entitled to the charge as above requested. *Luce v. Dorchester Mut. Ins. Co.* 110 Mass. 361. 1872.

§ 4. The mere change of occupants does not increase the risk. *Planters' Ins. Co. v. Sorrels*, 1 Baxt. 352. 1872.

§ 5. Policy provided that, if during the insurance the risk should be increased by the erection of buildings or by the use or occupation of neighboring premises or otherwise, it should be the duty of the insured to notify the company. The company reserves the right to terminate this insurance at any time by giving notice to that effect, &c. The defense was that a smoke-house, increasing the

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risk, was erected on the neighboring premises, of which the assured failed to give notice. *Held*, that the plaintiff had no knowledge of, and could not, by the lively exercise of proper diligence, ascertain such increased risk; the condition fairly construed did not oblige him, at his peril, to ascertain the facts and notify the company of their existence. If the company acquired knowledge of the increase of the risk from any source without exercising its option to cancel the policy, it would be liable for the loss. *Eclipse Ins. Co. v. Schowed*, 2 Cin. Supr. Ct. 474. 1873.

§ 6. Increase of risk is a question of fact to be determined by a jury. *Lattomus v. Farmers' Mut. Ins. Co.* 3 Houston (Del.), 404. 1873.

§ 7. Company is bound upon notice of increase of risk, to exercise its option of declaring policy void and cancelling it; if not done, company waives forfeiture on that ground. *Lattomus v. Farmers' Mut. Ins. Co.* 3 Houston (Del.), 404. 1873.

§ 8. Policy insured plaintiff's stock of fire-works and merchandise. The classification upon the policy specified fire-works as specially hazardous. Policy provided that whenever any article subject to legal restriction should be kept in quantity or manner different from that allowed by law, unless the use or keeping was specially provided for in the policy, it should be void. An ordinance of the city of New York prohibited "works of brilliant colored fires" from being stored within the city limits, but with this exception allowed fire-works to be kept in limited quantity for limited time. Plaintiff kept a quantity of "signal lights," classed as "works of brilliant colored fires," and evidence tended to show that the fire originated among them. *Held*, error to direct verdict for plaintiff: that if defendant was not entitled to a nonsuit, it was entitled to have the question of increase of risk submitted to jury. *Jones v. Firemen's Fund Ins. Co.* 51 N. Y. 318. 1873.

§ 9. The clause authorizing company, in case of increase of risk, to terminate the insurance upon notice and

return of unearned premium, was intended to provide for increase of risk by acts of third persons, and does not affect clause against increase of risk by means within control of assured. *Williams v. People's Fire Ins. Co.* 57 N. Y. 274. 1874.

§ 10. If the condition against increase of risk has been broken, there can be no recovery, though the fire may have been occasioned by some wholly independent cause. *Williams v. People's Fire Ins. Co.* 57 N. Y. 274. 1874.

§ 11. Whether there is a change or increase of risk consequent upon removal of a building 150 feet from the spot which it occupied when it was insured is a question of fact to be determined by the jury. *Griswold v. American Central Ins. Co.* 70 Mo. 654. 1874.

§ 12. "Increase of risk" is a question of fact, and must be submitted to jury. *Williams v. People's Fire Ins. Co.* 57 N. Y. 274. 1874.

§ 13. A condition providing that policy should be void "in case of any change by which degree of risk is increased" without written consent, has reference only to a change produced by act of the assured; such a change as company could consent to, and not to one occasioned by accident, or a cause over which the assured had no control. *Breuner v. Ins. Co.* 51 Cal. 101. 1875.

§ 14. Process of reducing liquors by the mixing of water and the making of cocktails, does not, as matter of law, increase the risk. Insurance was upon stock of groceries. *Bayly v. Lond. & Lanc. Ins. Co.* 4 Ins. L. J. 503. 1875. U. S. Circuit. La.

§ 15. Company cannot avail itself of defense of increase of risk, where, after knowledge of the facts, it permits its policy to stand without undertaking to cancel. *Fireman's Fire Ins. Co. v. Sholom*, 80 Ill. 558. 1875. s. p. Removal of goods. *Williamsburg City Ins. Co. v. Cary*, 83 Ill. 453. 1876.

§ 16. When policy provides that any change within control of the assured, material to the risk, shall void it, the change must be one which affects the condition of the property itself, and made by the act, authority, consent, procurement or cognizance of the assured. The mere vacation of the house by the assured or the occupants is not such a change. *Georgia Home Ins. Co. v. Kinnier*, 28 Grat. 88. 1876.

§ 17. Lighting a building with gasoline cannot be construed as using the building for a more hazardous business. *Mutual Fire Ins. Co. v. Coatsville Shoe Factory*, 80 Pa. 407. 1876.

§ 18. Policy provided that if the risk should be increased in any manner, that it should be void. Assured built an oven upon the premises, which was constructed and used with care. The agent knew of the existence of the oven, and had power, under the terms of the policy, to cancel it in case of any increase of risk, which he did not do. *Held*, that there was no violation of the condition. *Naugther v. Ottawa Ins. Co.* 43 Up. Can. Q. B. 121. 1878.

§ 19. The condition against occupancy or use so as to "increase the risk," only prohibits a new and different use from that to which property is applied when policy is issued, by which the risk is increased. The continuation of an existing use is no violation of such condition. *Whitney v. Black River Ins. Co.* 72 N. Y. 117. 1878. Aff'g 9 Hun, 37.

§ 20. While, in a case involving a question of increase of risk, the testimony of insurance experts may be properly received, it is not conclusive, even where uncontradicted, when a state of facts is presented upon which the jury after receiving all the light which can be obtained from it, are still called upon to decide whether the theories of the experts are not rendered inapplicable by special circumstances proved. *Cornish v. Farm Buildings Fire Ins. Co.* 74 N. Y. 295. 1878. Aff'g 10 Hun, 466.

§ 21. The erection of an adjoining building is an increase of the risk, the legal effect of which cannot be

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avoided by the setting up of some real or fancied lessening of the risk by removal of other buildings against the increased risk by the erection of the new building. *Pottsville Mutual Fire Ins. Co. v. Horan*, 89 Pa. 438. 1879.

§ 22. If risk be increased against a provision which declares such increase shall annul the policy, the company is absolved from the contract, such clause is operative though the fire was not caused by the increased risk. Hence if assured knowingly increases the risk, or permits it to be done, by using part of the house insured as a tin shop, he cannot recover though no work had been done in the shop for a few days prior to the fire. *Manufacturers' Ins. Co. v. Kunkle*, 8 Ins. L. J. 50. 1879. Pa.

§ 23. Upon an issue as to concealment and increase of risk, evidence that if company had known the fact it would have increased the premium, is not evidence of an increase of the risk. The question in such a case is not how the parties might regard it, but whether or not the fact concealed did increase the hazard. *Virginia F. and M. Ins. Co. v. Kloeber*, 9 Ins. L. J. 354. 1879. Va.

§ 24. Neglect to repair steam chest of a pump is not an increase of the risk, within meaning of these terms in a policy; it is merely such negligence as is covered by the insurance. *Albion Lead Works v. Williamsburg City Ins. Co.* 9 Ins. L. J. 435. 1880. U. S. Circuit, Mass.

§ 25. Policy contained condition that if risk should be increased either "internally or externally," without notice and consent, that it should be void. It also contained express conditions as to vacancy and occupancy. Company offered to prove upon the trial that the house being unoccupied increased the risk, and the evidence was excluded. *Held*, no error; that the general condition could not be applied to a case specially provided for by terms of the policy. That the words, "risk increased either internally or externally," do not refer to an increase of risk by removal from the house, but an increase of risk by internal or external changes in the house itself, or its exposure, which manifestly increase the risk so that it is not the same risk in-

sured. *Hermann v. Merchants' Ins. Co.* 81 N. Y. 184. 1880.

§ 26. The usual provision in policy for a renewal, does not have the effect to continue policy in force during term for which it was issued, when there has been an increase of risk. *Daniels v. Equitable Ins. Co.* 10 Ins. L. J. 417. 1881. Conn.

§ 27. Property insured was described in the policy as follows: "Furniture, fixtures and tools used by the assured in his business as renovator of furniture, clothing and carpets, and on the improvements to the building put in by him." There was this clause inserted: "Assured has permission to use naphtha in his business, but fire or lights are not permitted in the building, except a small stove in office." At that time there was no other stove in the building. Policy issued July 7, 1877, for one year. About January 1st following, a large stove was placed in a room used for a drying room, and was thereafter used in connection with hot water pipes for warming the naphtha in tanks in the basement. Fire occurred in April, caused by an explosion of gas. Upon the trial uncontradicted evidence was given that the risk was increased. Verdict for plaintiff. *Held*, that the verdict was contrary to law and evidence, and new trial granted. That it was no answer to say that company insured business carried on with naphtha, and that therefore assured had right to use ordinary means to carry on that business. The conditions and manner of use were defined and limited by agreement, and there was no right to use means which involved a violation of his agreement. Insurance is rendered void without regard to cause of the fire. *Daniels v. Equitable Ins. Co.* 10 Ins. L. J. 417. 1881. Conn.

§ 28. If there is no express prohibition against use of a threshing machine in close proximity to a barn insured, although fire is caused by its explosion, the question is, at most, one of increase of risk, and that is properly left to the jury. *Farmers' Mutual Fire Ins. Co. v. Moyer*, 10 Ins. L. J. 514. 1881. Pa.

See Alteration, § 2. Concealment, 9. Evidence, 44, 86. Lighting, 8, 4.

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## INSOLVENCY.

§ 1. Mortgages were executed by an officer and stockholder, in exchange for stock; they contained a provision that they might be paid in stock of the company, were not recorded, but were advertised as assets of the company. After losses were incurred company became insolvent and the mortgages were surrendered and canceled, on return and cancellation of the stock certificates. *Held*, that the transaction was a fraud on the policy holders, and that as to them the mortgagor was estopped from denying the validity of the mortgages. *Burnham v. N. W. Ins. Co.* 36 Iowa, 632. 1873.

§ 2. Directors of an insolvent company are not responsible for mere errors of judgment or want of prudence in conducting or closing up its business. *Lyman v. Bonney*, 118 Mass. 222. 1875.

See Mutual Company, § 9, 28, 29, 32, 66, 78, 79, 84, 92, 120, 183, 186. Pleading and Practice, 7. Re-Insurance, 15.

## INSURABLE INTEREST.

§ 1. Assured obtained policy as owner of building in his possession, on land subject to a lease, the title to which, prior to the insurance was in W. from whom the assured had received a unrecorded assignment of the lease. Before the policy was obtained W. had assigned the lease to another party and this assignment was recorded. *Held*, that by such recording, the title was in the latter assignee without entry and that the insured had no insurable interest. *Crockford v. Equitable Ins. Co.* 5 Allen, N. B. 651. 1863.

§ 2. A stock of goods covered by policy was sold to one M. who gave his notes therefor, indorsed by L. with an agreement that the proceeds of the sale of the goods should be paid over to L. and be applied in payment of the notes. Policy was assigned to L. by consent of the company, all parties having knowledge of the facts. *Held*, that L. had an insurable interest in the goods. *Davies v. Home Ins. Co.* 3 Grant Err. & App. 269. 1866. Reversing 24th Q. B. 364.

§ 3. Land upon which house insured stood was leased to plaintiff's husband who had died in 1860. Plaintiff retained possession from that time and paid the ground rent. No administration was taken out on the husband's estate, nor did it appear that any claim was made against the plaintiff in behalf of any of the next of kin. *Held*, that the plaintiff had an insurable interest either upon the ground of a presumption that the house belonged to the plaintiff, or as executrix *de son tort*, or as a widow under the statute of distribution. *Lingley v. Queen Ins. Co.* 1 Hannay, N. B. 280. 1868.

§ 4. An equitable interest is an insurable interest. If insured is in possession under a contract for purchase and has paid part of the consideration, he has an insurable interest. *Tuckerman v. Home Ins. Co.* 9 R. I. 414. 1870.

§ 5. When a deed is shown to have been intended as a mortgage only it does not deprive the assured of an insurable interest. Kelly v. Liv., Lond. & Globe Ins. Co. 2 Hannay, 266. 1871.

§ 6. Owner of property, although having parted with possession under an executory contract of sale, retains an insurable interest. Wood v. North Western Ins. Co. 46 N. Y. 421. 1871.

§ 7. On May 26, 1868, owner of property gave a mortgage to Little and Stanton to secure six notes. On Jan. 31, 1870, Little and Stanton assigned the mortgage and *indorsed* the notes to the plaintiff. Policy was issued July 5, 1870, by which defendants insured "Little and Stanton, *mortgagees*," loss payable to plaintiff. Policy contained usual condition requiring interest to be stated in policy if not sole and absolute ownership, &c. *Held*, that Little and Stanton retained and had an insurable interest on account of their liability as indorsers of the notes and right to have mortgage reassigned to them upon payment of the same, and that their interest was sufficiently stated. Williams v. Roger Williams' Ins. Co. 107 Mass. 377. 1871.

§ 8. House and lot had been occupied by assured and husband as a homestead; he abandoned her, making a verbal gift to her of the property, where she continued to reside with her family. Building was erected partially with her own earnings. *Held*, that she had an insurable interest. Rockford Ins. Co. v. Nelson, 65 Ill. 415. 1872.

§ 9. When company (in order to remove the effect of a mistake in the name of the assured) makes an indorsement upon the policy making loss payable to third parties, in an action brought by the latter, it will not be permitted to defeat it by setting up want of an insurable interest. Mathews v. Queen City Ins. Co. 2 Cin. Supr. Ct. 109. 1872.

§ 10. Where lessee of a farm is bound by terms of a written lease not to sell the hay and other produce with-

out written consent of the lessor, without such written consent the former cannot convey any interest in the hay and produce to another which will be insurable. *Heald v. Builders' Ins. Co.* 111 Mass. 38. 1872.

§ 11. The insurable interest of a lessee bound to replace, extends to the full value of the property, and such is the measure of damages. *Imperial Fire Ins. Co. v. Murray*, 73 Pa. 13. 1873.

§ 12. State being in possession, even without title, has a right to insure in its own name for benefit of the real owners, and to maintain an action as trustees of an express trust. *People v. Liv., Lond. & Globe Ins. Co.* 2 T. & C. (N. Y. Sup.) 268. 1873.

§ 13. When a sub-lessee of a plantation is shown to have an absolute interest in certain proportion of cotton such interest cannot be destroyed or effected by a chattel mortgage executed by the lessee to a third party, that the interest of the sub-lessee acquired by agreement or lease could not be encumbered in any way by the lessee. *Georgia Home Ins. Co. v. Jones*, 49 Miss. 80. 1873.

§ 14. A liability as common carrier is sufficient to confer an insurable interest, under a policy insuring a railroad company upon "any property for which they may be liable." And the right to recover against the insurance company is not affected by the fact that the railroad company is indemnified by other roads for the loss of the property insured. *Commonwealth v. Hide and Leather Ins. Co.* 112 Mass. 136. 1873.

§ 15. Assured held policy which stated that property was held by him "under contract of purchase." Upon the trial defendant offered to prove that plaintiff, although he bid off property at receiver's sale in his own name, in fact bought it for another. Testimony was rejected. *Held*, no error, that by the sale and conveyance, if plaintiff did so purchase, he had the legal title as against the whole world, save perhaps party for whom he acted and his creditors, and as the owner of the legal

title, he had an insurable interest. *Bicknell v. Lancaster City Ins. Co.* 58 N. Y. 677. 1874.

§ 16. It is not necessary to have an absolute vested ownership or property in that which is insured; it is sufficient to have a right in the thing insured of such a nature that the party insuring may have benefit from its preservation and prejudice from its destruction. *Cumberland Bone Co. v. Andes Ins. Co.* 64 Me. 466. 1874.

§ 17. Property insured consisted of railroad ties cut under a contract with a railroad construction company and piled along the road. The ties were not fully accepted by the construction company so as to render it responsible to the assured for payment until they had been severally examined as they were laid in place upon the roadbed. *Held*, that assured's insurable interest continued until the ties were accepted by the construction company in such manner as would bind it to pay for them. *Chandler v. St. Paul's Ins. Co.* 21 Minn. 85. 1874.

§ 18. An administrator with the will annexed has an insurable interest in the trust property. *Babson v. Thomaston Ins. Co.* 4 Ins. L. J. 50. 1874. U. S. Circuit, Me.

§ 19. An owner of land agreed by parol to convey it to another in fee upon the verbal promise of the person to whom the conveyance was to be made, on receiving it to give back a conveyance to the grantor, of a life estate in the same premises. The agreement on part of owner was executed by a conveyance. The grantee neglected or omitted to convey the life estate according to the agreement, and the grantor remained in possession. *Held*, grantor had an insurable interest. *Redfield v. Holland Purchase Ins. Co.* 56 N. Y. 354. 1874.

§ 20. Plaintiff leased property for term of five years from April 1, 1861, giving lessee privilege of purchase and to whom he gave up possession. With knowledge and assent of all parties, about same time, company issued policy which in terms insured the plaintiff, but the loss, if

any, was made payable to the lessee to indemnify him for improvements. Policy was intended for benefit of both. April 6th fire occurred. Notice and proofs were given by plaintiff, who previous to commencement of action took an assignment of all claim of the lessee under the policy. *Held*, plaintiff had an insurable interest, and was entitled to recover full amount of loss. *Hand v. Williamsburg City Fire Ins. Co.* 57 N. Y. 41. 1874.

§ 21. A void tax sale does not affect an insurable interest nor a representation as to ownership. *Cheek v. Columbia Fire Ins. Co.* 4 Ins. L. J. 99. 1874. Tenn.

§ 22. Owner of property sold on execution retains an insurable interest so long as his right to redeem has not lapsed. *Cone v. Niagara Fire Ins. Co.* 60 N. Y. 619. 1875.

§ 23. In case of foreclosure and judgment therein insurable interest of the assured continues until the time for redemption expires. *Mechler v. Phoenix Ins. Co.* 38 Wis. 665. 1875.

§ 24. A policy obtained by a part-owner of the property insured without previous authority or subsequent ratification by the other owners covers only the interest of the party procuring it. *Knight v. Eureka Fire Ins. Co.* 26 Ohio, 664. 1875.

§ 25. Where a wife by a written instrument declared that she owed her husband so much money, "which amount shall be a lien on my property," he being and continuing in possession. *Held*, sufficient to create an insurable interest. *Rohrbach v. Germania Fire Ins. Co.* 62 N. Y. 47. 1875.

§ 26. If there be a right in or against the property, which a court will enforce, a right so closely connected with it, and so much dependent for value upon the continued existence of it alone, so that a loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest. *Rohrbach v. Germania Fire Ins. Co.* 62 N. Y. 47. 1875.

§ 27. Policy insured W. A. Hardy upon whiskey, &c., "their own or held by them in trust, &c., on commission, or sold but not delivered." Property was actually owned by another. Assured was his general agent having custody and control of the property, with full power to preserve and dispose of it according to his discretion, and was liable to account for it and the proceeds when sold. *Held*, that assured had sufficient insurable interest to entitle him to be insured in his own name. *Kline v. Queen Ins. Co.* 7 Hun, 267. 1876. Aff'd (without opinion) 69 N. Y. 614.

§ 28. To defeat an insurable interest, a forfeiture provided for by the terms of a lease must be strictly construed. *Ins. Co. v. Diggs*, 8 Baxt. 563. 1876.

§ 29. Although a mortgage executed by a husband to his wife during coverture may be void at law, it may be valid in equity if founded on a good and valuable consideration. In such a case the wife has an insurable interest to the extent of amount due on the mortgage. *Mix v. Andes Ins. Co.* 9 Hun, 397. 1876. Rev'd 74 N. Y. 53 on another point.

§ 30. Liability for tax on whiskey lost while stored in warehouse is sufficient to create an insurable interest. *Ins. Co. v. Thompson*, 5 Otto, 547. 1877.

§ 31. Legal title was in the father of the assured, the latter being in possession, under an agreement that property was to be reconveyed whenever assured might wish. *Held*, that assured had an insurable interest. *Pettigrew v. Grand River Ins. Co.* 28 Up. Can. C. P. 70. 1877.

§ 32. If assured has paid a certain amount for property insured, receiving a bill of sale therefor and delivery of the same, he has an insurable interest therein to extent, at least, of money paid, though there may have been an understanding that the property would be reconveyed, on repayment of the money. *Little v. Phoenix Ins. Co.* 123 Mass. 380. 1877.

§ 33. Assured was a sub-lessee who had erected building insured, which it was conceded became part of the real

estate, and, at the end of the lease, would pass to the owner of the soil. Policy was issued two years before expiration of the lease, and the loss occurred within the term. The policy read as follows: "On his two story, &c., situate on leased land." *Held*, assured had an insurable interest, and that the clause "situate on leased land," was a sufficient compliance with provision of policy requiring that notice of interest should be truly stated in the policy; that the statement implied that whatever interest assured had, it was subject to terms of a lease, particulars of which were not called for by the policy or made the subject of specific inquiry. *Fowle v. Springfield Fire Ins. Co.* 122 Mass. 191. 1877.

§ 34. An assignment absolute upon its face, but shown to have been executed and delivered as a mortgage merely, and held as collateral security, does not effect such a sale and delivery of the property insured, or destroy all interest or liability on the part of the insured therein so as to terminate the insurance. *Chandler v. Commerce Fire Ins. Co.* 88 Pa. 223. 1878.

§ 35. An executory contract of sale does not destroy an insurable interest. *People's Ins. Co. v. Straehle*, 2 Cin. Supr. Ct. 186. 1878.

§ 36. Assured, who had advanced money upon a vessel in course of construction, and obtained insurance upon it in his own name, without ever having possession of the vessel or holding any bill of sale or transfer of it, *Held*, that he had no insurable interest and could not recover. *Clark v. Scottish Imperial Ins. Co.* 2 Pugsley & B., N. B. 240. 1878.

§ 37. Party in possession of property, and holding power of attorney, from owner of legal title, to dispose of the same in consideration of money advanced by him to assist the latter in the purchase, has an insurable interest. *Brugger v. State Invest. Ins. Co.* 5 Sawyer, 304. 1878.

§ 38. It is not competent to write an insurance where an insurable interest is wanting, whether the facts are known to the company or not; the difficulty is inherent

in the case, and is beyond reach of a waiver. Agricultural Ins. Co. v. Montague, 38 Mich. 548. 1878.

§ 39. Right in assured to possession and use of the property under a contract of purchase, title to remain in vendor until fully paid for, confers upon the former an insurable interest. Holbrook v. St. Paul Ins. Co. 25 Minn. 229. 1878.

§ 40. Warehousemen as bailees have an insurable interest. Richmond v. Niagara Fire Ins. Co. 79 N. Y. 230. 1879.

§ 41. The interests of joint-owners or owners in common are distinct for all purposes of indemnity against loss, and therefore, of insurance, as if they owned different and distinct things, and hence an insurance effected by one will not serve to protect the share or interest of another. Harvey v. Cherry, 76 N. Y. 436. 1879.

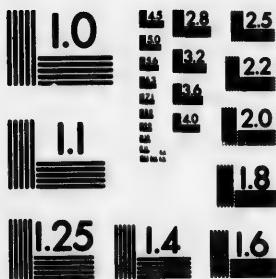
§ 42. No right of property in the thing insured is required to sustain an insurable interest; it is sufficient if party is so situated as to be liable to loss if it should be destroyed by peril insured against. Harvey v. Cherry, 76 N. Y. 436. 1879.

§ 43. Assured had conveyed the property to another, taking back a deed of defeasance containing provision for reconveyance. *Held*, that he had an insurable interest. Walsh v. Philadelphia Fire Association, 127 Mass. 383. 1879.

§ 44. There must be some interest in property burnt at time of the fire; otherwise there can be no recovery. Monroe v. Southern Mut. Ins. Co. 63 Ga. 669. 1879.

§ 45. Defense was that the assured had no interest as owner. Policy covered both real and personal property which was in premises of plaintiff. Evidence tended to prove that the property was conveyed by one Henry J. David, who then owned the same, to Marx David, who was a fictitious person, and then, that in the name of Marx David he conveyed same property to plaintiff. Court charged jury "that if they believed that Marx David was

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a myth, or that there was no such real person, or that he never executed the deed or bill of sale, it was an end of plaintiff's case, and they must find for defendant." *Held*, error. That Henry J. David was bound, even although he used an assumed name. That the title was good as against him, and there being no evidence of any other claimant, plaintiff showed sufficient title to sustain his action. *David v. Williamsburg Ins. Co.* 83 N. Y. 265. 1880.

§ 46. A party who has a mechanic's lien has an insurable interest to extent of value of the building and amount of his claim; the facts that he has commenced a suit to enforce the lien and discontinues it after the fire, are no defense to an action brought by him upon his policy. *Insurance Co. v. Stinson*, 13 Otto, 25. 1880.

§ 47. Owner of property has an insurable interest to the extent of the value of the building notwithstanding the existence of a mortgage upon the property of a sufficient amount to absorb it. *Insurance Co. v. Stinson*, 13 Otto, 25. 1880.

§ 48. When a life interest is insured its value depends, treating it as an unqualified life estate on age and expectation of life. If estate is qualified by provision that party is to use and occupy so long as he chooses to make property his home, the interest is still less valuable. The insurable interest of such a party is the value of the use to him. In case of a man sixty-five years of age, value of his life would be worth, according to usual tables, forty-five per cent. of the whole value of the property. If right is entirely personal and not alienable, its value would be still less. *Per Johnson, J. Farmers' Ins. Co. v. Archer*, 10 Ins. L. J. 370. 1881. Ohio.

§ 49. Both parties admitting existence of a parol contract for sale of land, with vendee in possession and part of the purchase-money paid, is sufficient to create an insurable interest in the latter. *Farmers' Ins. Co. v. Meckes*, 10 Ins. L. J. 707. 1881. Pa.

See Alienation, § 33. Burden of Proof, 1. Damages, 15. Evidence, 27, 39, 75. Mortgagor and Mortgagee, 2. Pleading and Practice, 5, 18, 29. Title, 12. Valued Policy, 2. Warranty and Representation, 62, 75.

## INTEREST IN POLICY.

§ 1. Loss being made payable to a third party as interest may appear cannot give such party greater or other rights than are possessed by the assured. *Home Mut. Ins. Co. v. Hauslein*, 60 Ill. 521. 1871.

§ 2. When policy provided that in case it was held as collateral security any claim under it "should not be payable until payment of such portion of the debt shall have been enforced as can be collected out of the original security," and the company then to be liable to pay such sum only, not exceeding sum insured, as could not be collected out of such primary security, and it was obtained by the owner who had parted with possession of property under an executory contract of sale, the premium being paid by the vendee under an agreement so to do. *Held*, that policy was taken for benefit of latter, and was not held as collateral security within the meaning of the constitution. *Wood v. North Western Ins. Co.* 46 N. Y. 421. 1871.

§ 3. Where property insured is destroyed during pendency of partition suit, the money should be applied towards the satisfaction of encumbrances due before being divided. *Kingsbury v. Buckner*, 70 Ill. 514. 1873.

§ 4. A tenant-in-common who has obtained insurance in his own name, paying the premium himself, is not accountable to his co-tenants for the insurance money received in the absence of an agreement to that effect. *McIntosh v. Ontario Bank*, 20 Grant Ch. 24. 1873.

§ 5. When insurance is in the name of a certain party covering his interest and of others owning property in a warehouse, if the assured named settles his individual loss, giving a release without prejudice to the claims of the other owners. *Held*, that all the remaining parties interested in the policy and insurance might unite in bringing an action for the amount due them in their own names. *Strohn v. Hartford Fire Ins. Co.* 33 Wis. 648. 1873.

§ 6. Policy insured plaintiffs specifically on cotton gin and press, and interest on account of repairs. Issued Dec. 28, 1866, for twenty days; renewed Jan. 17, 1867, for twenty days. Plaintiffs were partners. January 15, 1866, they made an agreement with one Flurnoy to operate his plantation for one year. Plaintiffs were to furnish supplies and stock; implements and stock on plantation to remain and be used; any more required plaintiffs to furnish. Flurnoy to supervise the work and to make all permanent improvements. Crop of cotton to be delivered to plaintiffs and sold. Proceeds to be used (1) to reimburse plaintiffs for advances, balance to be divided equally between plaintiffs and Flurnoy. At expiration of one year stock and implements were also to be equally divided. In pursuance of agreement plaintiffs repaired the gin house and put in a new gin and press and mule power. Cotton was picked and a portion sent to market. While a portion remained in gin house, fire occurred consuming it and contents. Date of fire Jan. 18, 1867. Policy contained clause to effect that if the assured were not the sole and unconditional owners, it should be void. Plaintiffs recovered for loss on cotton \$2,812; mule power as repairs, \$425; gin and press, \$600. *Held*, that as it appeared plaintiffs had expended more than the whole crop was worth, and were therefore under the contract entitled to entire proceeds, that Flurnoy's interest had ceased, and plaintiffs were the sole and unconditional owners. But that as to the gin and press Flurnoy had an equal interest and they were not sole owners. That policy was to be treated as written on day of its renewal. That mule power was not part of the gin house and could not be considered repairs. Judgment reduced accordingly. *Noyes v. Hartford Ins. Co.* 54 N. Y. 668. 1873. s. o. 3 Ins. L. J. 44.

§ 7. In August, 1864, defendant purchased one-half of a house and lot and took deed in his own name, the consideration being \$400, and the plaintiff owning and occupying the other half. By agreement plaintiff was to take charge of the house, make necessary repairs, and pay necessary expenses, until defendant should wish to occupy

it. About time of his taking charge, plaintiff took out a policy of insurance in name of defendant for \$500, and paid the premium. House was destroyed by fire in 1865 and plaintiff received on the policy as defendant's agent the amount insured. Upon an accounting between the parties it was *Held*, that the plaintiff owed the defendant the amount of the insurance obtained by him and that while he had no insurable interest he could not be permitted to show by his own testimony that he intended to protect and secure his own interest. *Looney v. Looney*, 116 Mass. 283. 1874.

§ 8. Those persons are deemed to be included in the policy who were in the minds of the parties when the contract was made. *Pitney v. Glen's Falls Ins. Co.* 65 N. Y. 6. 1875.

§ 9. Policy was issued to one Palmer, the owner, "loss, if any, payable to plaintiff," an encumbrancer. *Held*, insurance was upon interest of former, and that it was the loss sustained by that interest which was to be paid to latter and that it was not necessary to join the owner as a party. That if he had made claim defendant could have had interpleader. That plaintiff had a right to recover the whole loss sustained by the owner's insurable interest, and the balance if any over the extent of his lien he would hold as trustee for the owner. *Cone v. Niagara Fire Ins. Co.* 60 N. Y. 619. 1875.

§ 10. Tenant by terms of the lease was bound to rebuild in case of fire. The lessor procured insurance in his own name and paid the premium. Lessee was requested to pay the premium but declined to do so. Lessee having rebuilt brought suit in equity for purpose of obtaining benefit of the insurance. *Held*, that insurance was upon interest of lessor and exclusively for his benefit, that lessee had no right to share therein; bill dismissed. *Ely v. Ely*, 80 Ill. 532. 1875.

§ 11. Where the evidence shows an *intent* to insure the interest of a party to whom loss is made payable, such clause may be regarded as a new contract with real party

in interest, and such interest may be shown by parol testimony. *Pitney v. Glen's Falls Ins. Co.* 65 N. Y. 6. 1875.

§ 12. Policy insured Lane to amount of \$2,000—\$1,000 on gin house and \$1,000 on machinery. Loss on machinery if any payable to extent of \$2,000 to Pritchett. Plantation belonged to Lane who leased it to one Clark who owned the machinery which he had purchased from Pritchett and for which he owed the price. Clark as required by the lease, as the agent of Lane, obtained the policy and paid the premium with his means. *Held*, that Lane was entitled to the amount due under the policy; that Clark could not direct the insurance money to be paid to his own creditor—it belonged to his principal. *Pritchett v. Mech. & Trad. Ins. Co.* 27 La. Ann. 525. 1875.

§ 13. Upon the death of the assured a policy passes as other choses in action to an administrator and he only has a right of action upon it. *Georgia Home Ins. Co. v. Kinnier*, 28 Grat. 88. 1876.

§ 14. In Louisiana the lien of landlord upon goods of tenant is lost by destruction of the property, and does not attach to the insurance money. *In re Reis*, 3 Woods, 18. 1876.

§ 15. A creditor has no claim in equity upon money due under a policy obtained by another creditor issued at his own instance and cost and in his own name. *Wheeler v. Ins. Co.* 3 Woods, 43. 1877.

§ 16. When a husband has insured his wife's separate property as his own, he cannot recover without proof of his own interest and damages to it. *Cohn v. Virginia Fire Ins. Co.* 3 Hughes, 272. 1877.

§ 17. A party conveyed a farm, and as part of the consideration took a \$4,500 judgment which he entered against the property sold. He afterwards accepted one Conner as security for the remaining part of the consideration, \$3,000, and did not enter it against the property sold. The purchaser procured a policy of insurance for \$3,400,

\$900 of which was to be for his benefit, and made a written assignment of the policy to theendor, stating that the balance was to be as collateral security for money loaned on the premises. *Held*, that a proper construction of the transaction was that the assignment which was indorsed upon the policy was to secure the \$4,500 judgment; that the parties considered that sum loaned on the premises sold, and the \$3,000 as a separate and independent security, and that the proceeds of the policy after the fire were to be apportioned first, \$900 to the purchaser, the balance to be applied to the \$4,500 judgment. *Caley v. Hoopes*, 86 Pa. 493. 1878.

§ 18. Loss being made payable to a third party does not make policy an insurance of another interest from that of the owner and assured. *Van Alstyne v. Aetna Ins. Co.* 14 Hun, 360. 1878.

§ 19. The rule that parol evidence is admissible, where policy insures trustee or factor, for purposes of determining the person to receive indemnity, has no application where the policy itself names the owners or *cestui que trust*. *Bishop v. Clay Ins. Co.* 45 Conn. 430. 1878.

§ 20. A man conveyed property to his wife in fraud of his creditors. She obtained insurance in her own name. A fire having occurred, and the creditors of the husband having filed a bill in equity to subject the insurance money to payment of the husband's debt. *Held*, that they had no equity in such fund and the bill dismissed. *Bernheim v. Beer*, 56 Miss. 149. 1878.

§ 21. One entitled to redeem land conveyed by him to another as security for a debt has no claim in absence of a contract against the latter on account of insurance obtained by him upon the buildings for his own benefit and at his own expense. *McIntire v. Plaisted*, 68 Me. 363. 1878.

§ 22. Policy was issued to the "Minnesota Land Co." and it being claimed on the part of the defendant that the policy was void because the company was not a cor-

poration. *Held*, that it was immaterial whether it was a corporation or not, the company doing business under a common name, and all its acts not requiring corporate powers were good both for it and against it if it was not a corporation. *Holbrook v. St. Paul Ins. Co.* 25 Minn. 229. 1878.

§ 23. Lease bound the landlord to keep insured, and the tenant in possession had the option of purchase for a consideration therein named. The building was destroyed by fire and the landlord was paid the insurance. Subsequently the tenant exercised his right of purchase under the lease and claimed the insurance money from the landlord as part of the purchase. *Held*, that there being no express agreement in relation to the insurance money that the tenant had no right or lien upon it, and his bill dismissed. *Edwards v. West*, L. R. 7 Ch. Div. 858. 1878.

§ 24. Owner of property conveyed it as security for debt, taking back a lease for eight years at a yearly rent of \$105, with privilege of redemption or purchase on payment of \$1,500. Value of premises at time of fire was \$3,500. But two months of the term conferred by the lease remained when fire occurred, and the privilege of redemption had not been taken advantage of. Policy insured former owner upon "his interest as lessee." *Held*, that the privilege of purchase was a part of the interest of assured as lessee and was covered by the policy. That the value of such privilege was \$2,000. *Creighton v. Homestead Fire Ins. Co.* 17 Hun, 78. 1879.

§ 25. When agent of company is notified of change of interest on renewal of a policy, the insurance is regarded as being continued upon such interest, although no indorsement is made. *Whited v. Germania Fire Ins. Co.* 76 N. Y. 415. 1879.

§ 26. When policy is made payable to party who brings the action, it cannot be defeated by unlawful acts of the owner and assured. *Westchester Fire Ins. Co. v.*

Foster, 90 Ill. 121. 1878. But see Continental Ins. Co. v. Hulman, 92 Ill. 145. 1879.

§ 27. If property is destroyed before an executory contract for the sale is consummated, the purchaser, in the absence of any provision of the contract to the contrary, cannot claim or receive the benefit of insurance money due upon a policy held by the vendor, either in reduction of amount due upon the purchase, or by applying the money to replacing of the building. Rayner v. Preston, L. R. 14 Ch. Div. 297. 1880. s. c. 10 Ins. L. J. 76, 556. S. P. Plimpton v. Farmers' Mut. Ins. Co. 1 Ins. L. J. 678. 1871. Gilbert v. Post, 28 Ohio, 276. 1876.

See Alienation, § 2, 6, 22, 45. Goods in Trust, 6, 8, 9. Insurable Interest, 24, 41. Mortagor and Mortgagee, 5, 7, 8, 11, 12, 14, 15, 20, 21, 29, 32, 34, 38, 47, 49. Mutual Company, 103. Subrogation, 2. Title, 12, 57. Who may Sue, 5, 10, 16.

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## LIGHTING.

§ 1. Policy prohibiting the use of kerosene oil, except in dwellings, is avoided by use of such oil in a lamp left upon the counter of a store as a protection against burglars. The store could not be considered a "dwelling" because the clerk slept in a small room back of the store. Cerf v. Home Ins. Co. 44 Cal. 320. 1872.

§ 2. Policy contained condition that if gunpowder, camphene, spirit gas, naphtha, benzine or benzole, chemicals, crude or refined coal or earth oils were kept or used on the premises without consent, it should be void. Kerosene oil was used to light the cabin of the boat insured after the policy was issued. Held, that the term "refined coal or earth oils" could not be held to include kerosene; that they should be construed to mean only those articles or substances which are included in the general description, and which are also as highly inflammable and therefore as

dangerous to the insured property as naphtha, benzine or benzole, and that therefore the insurance was not voided by the use of kerosene for lighting purposes. Morse v. Buffalo Fire Ins. Co. 30 Wis. 534. 1872.

§ 3. The fact that there is inserted in the policy a special clause as follows: "Permission is granted to light the premises with gasoline gas when the generator is to remain 30 feet from the building," does not prevent the agent of the company who issued the policy from binding the company by a parol agreement that the assured may use gasoline temporarily pending a change from gas to kerosene. Winans v. Allemania Fire Ins. Co. 38 Wis. 342. 1875.

§ 4. When there is no provision in the policy making it void for a temporary increase of risk, the temporary use of gasoline for lighting purposes discontinued before the fire does not render the policy void. Mutual Fire Ins. Co. v. Coatsville Shoe Factory, 80 Pa. 407. 1876.

§ 5. Policy prohibited use of *gasoline* for lighting. Building was lighted with gas made from gasoline. Held, that, in the absence of evidence that gas and gasoline were the same, or similar in most respects, that gasoline may not be used or burned in some other manner than gas which is manufactured from it, and that the gas is as dangerous as gasoline, it could not be assumed that the gas manufactured from the latter, was within the prohibition. Arkell v. Commerce Ins. Co. 69 N. Y. 191. 1877. Aff'g 7 Hun, 455.

§ 6. Upon an issue as to whether an article called "mineral sperm oil," used for lighting purposes is a product of petroleum or not, defendant cannot introduce in evidence a phial containing a mixture called by the same name in the trade without connecting it in some way with that which was actually used by the assured. Hicks v. Empire Ins. Co. 6 Mo. App. 254. 1878.

§ 7. Policy provided that defendant should not be liable for a loss occasioned by the use of kerosene oil as a

light in any barn or outbuilding. *Held*, that condition could not be construed as referring to an habitual use, or so as to confine it to the direct and immediate effect of the kerosene, such as an explosion, but must have contemplated the danger resulting from upsetting of a lamp or breaking by some intervening accident. Nor is it necessary that the use should be by assured personally. If used by any member of household it is within terms of policy. *Matson v. Farm Buildings Ins. Co.* 73 N. Y. 310. 1878. *Rev'g 9 Hun, 415.*

See Increase of Risk, § 17. Storing and Keeping, 7, 16, 18, 19, 22.

### LIMITATION CLAUSE.

§ 1. Although the limitation clause is valid and will be enforced if an action is fairly brought within the limited time with a view to ascertain and enforce the rights of the assured, it answers the terms of such condition, and though discontinued voluntarily without bad faith, if the claim be prosecuted promptly in another action, it is not barred. *Fellowes v. Madison Ins. Co.* 2 Disney Cin. Supr. Ct. 128. 1858.

§ 2. When a waiver of the limitation clause is to be deduced solely from the acts and declarations of one party in the absence of proof that anything has been done or stipulated upon the faith of it by the other, the intention to waive should be clear. *Schroeder v. Keystone Ins. Co.* 2 Phil. Rep. 286. 1859.

§ 3. An attachment served upon the company in a suit brought by creditors of the assured, does not excuse failure to bring action on the policy within the limited time. *Schroeder v. Keystone Ins. Co.* 2 Phil. Rep. 286. 1859.

§ 4. Further proofs being required and a promise or intimation held out of payment, may constitute a waiver

of limitation clause, but if assured determines to furnish no more proof, he has no right to rely upon action of company. *Curtis v. Home Ins. Co.* 1 Biss. 485. 1865. And see *Ide v. Phoenix Ins. Co.* 2 Biss. 335 *note.* 1870.

§ 5. A limitation clause in reference to time within which suit must be brought is valid and will be enforced. *Davidson v. Phoenix Ins. Co.* 4 Sawyer, 594. 1866. *Glass v. Walker,* 66 Mo. 32. 1877.

§ 6. Loss occurred on the 17th of October, 1869, and action was commenced on the 7th of November, 1870. There was an adjustment on the 6th of November, 1869, when the parties entered into an agreement in writing by which the assured agreed to accept the amount of adjustment and the company promised to pay that amount on the 6th of February, 1870, unless the assured should be notified by the company before that time either personally or by letter of its intention to contest its liability upon the policy. *Held,* that even if the assured did not have a right of action upon the adjustment, the limitation prescribed in the policy did not run during the time mentioned in the agreement. This time during which he was induced by the act of the company to delay bringing suit should not be considered any part of the 12 months to which his action was limited. *Black v. Winnesiek Ins. Co.* 31 Wis. 74. 1872.

§ 7. Jury were charged that "if plaintiff delayed bringing suit until after the expiration of six months in consequence of inducements held out by defendant, causing him to believe that the loss would be paid or adjusted without suit, this would operate to remove the bar created by condition requiring action to be brought within six months after a loss." *Held,* no error. *Mickey v. Burlington Ins. Co.* 35 Iowa, 174. 1872. *s. p. Andes Ins. Co. v. Fish,* 71 Ill. 620. 1874. *Derrick v. Lamar Ins. Co.* 74 Ill. 404. 1874.

§ 8. The mere pendency of negotiations, or the fact that occasional interviews occurred between the parties in regard to an adjustment or settlement, cannot have the

effect of a waiver of the limitation clause unless there is something said or done which was either designed or fairly calculated to induce a party to have a reasonable belief on sufficient grounds, not merely that a settlement might be effected, but that the company intended to waive benefit of the provision. The mere expression of an opinion that company would settle, and requesting party to call, is nothing more than is implied by the acts of the parties in attempting to negotiate at all. *McFarland v. Peabody Ins. Co.* 6 W. Va. 425. 1873.

§ 9. A failure of a previous action from any cause cannot alter the effect or change the operative force of the limitation clause. *McFarland v. Aetna Ins. Co.* 6 W. Va. 437. 1873.

§ 10. When performance of an insurance contract is defeated by war which prevents a suit, the ordinary statute of limitations only remains for the protection of the company. *Phoenix Ins. Co. v. Underwood*, 12 Heiskell, 424. 1873.

§ 11. *Sembler* that neglect to sue receiver of an insurance company within time prescribed by the policy does not bar the claim. *Sands v. Son*, 1 T. & C. (N. Y. Sup.) 13. 1873. Rev'd 56 N. Y. 662.

§ 12. The limitation of time within which action must be brought commences to run from the "date of the loss," and not from sixty days after loss is proved or adjusted. *Carraway v. Merchants' Mut.* 26 La. Ann. 298. 1874.

§ 13. Policy provided that suit should be brought within one year next after "any claim shall occur." *Held*, that the time thus limited did not begin to run until the claim accrued, and that the time during which the assured could not sue according to the terms of the policy should not be counted as part of the year within which he was required to sue. *Chandler v. St. Paul Fire Ins. Co.* 21 Minn. 85. 1874.

§ 14. Stockholder made personally liable for the debts of an insurance company, cannot avail himself of the lim-

itation clause in the policy. *Davis v. Stewart*, 26 Ohio, 643. 1875.

§ 15. The limitation clause is reasonable and binding by assured's acceptance of the policy. *Underwriters' Agency v. Sutherlin*, 55 Ga. 266. 1875.

§ 16. Assured delivered to local agent of company ten days after the fire, a paper containing a detailed statement of the loss, by a builder, and sworn to. When he applied to the agent in time to have made out formal proofs, he was informed that it was useless, and would be but a loss of time, as the company was entirely bankrupt. This information, coming from the agent, was believed, and no other proofs were furnished. Before the expiration of a year after the fire, court had taken hold of all the funds of the company as a trust fund for use of creditors, in a suit brought in their behalf. *Held*, that assured was entitled to prove his claim, and was not barred by limitation clause in the policy. *Pennell v. Chandler*, 5 Ins. L. J. 107. 1875. Ill.

§ 17. Defective summons or process may be amended so as to prevent company from availing itself of the defense that action is not brought in the limited time. *Burton v. Buckeye Ins. Co.* 26 Ohio, 467. 1875.

§ 18. A denial of all liability and peremptory and absolute refusal to pay, operates as a waiver of the limitation clause. Upon such denial and refusal an action may be commenced at once. *State Ins. Co. v. Maackens*, 9 Vroom, N. J. L. R. 564. 1876. *Williamsburg City Ins. Co. v. Cary*, 88 Ill. 453. 1876.

§ 19. Negotiations for a settlement without any reference to the limitation clause, and the further fact that the negotiations terminated to the knowledge of the assured in sufficient time to have enabled him, if sufficiently alive to the terms of his contract, to have commenced his action within the limited time, does not show any right on his part, either in law or in equity, to prevent company from availing itself of the limitation clause. *Davis v. Canada Farmers' Ins. Co.* 39 Up. Can. Q. B. 452. 1876.

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§ 20. The limitation clause is not against public policy, nor is it merged in the general limitation laws of the State. *Ins. Co. v. La Croix*, 35 Tex. 249. 1872. 45 Tex. 158. 1876.

§ 21. When policy provides that a claim under it must be *prosecuted* within a limited time, a notice of a loss and demand of payment cannot be construed as such a prosecution. *Ins. Co. v. La Croix*, 35 Tex. 249. 1872. 45 Tex. 158. 1876.

§ 22. When agents of company delay settlement upon pretense of seeking to adjust amount of loss, and while admitting liability, prolong the negotiation, and induce assured to delay bringing an action, by leading him to believe that limitation clause would not be insisted upon, it constitutes bad faith on part of the defendant, and a verdict in favor of assured on such an issue will be sustained on slight evidence. *Little v. Phoenix Ins. Co.* 123 Mass. 380. 1877.

§ 23. When complaint is filed within the year, but no summons is issued at request of company's agent and attorney, company is estopped from subsequently setting up that suit was not commenced within the year. *Akin v. Liv., L. & G. Ins. Co.* 6 Ins. L. J. 341. 1877. U. S. Circuit, Ark.

§ 24. A limitation clause prescribing that action must be brought within twelve months after loss is inoperative under Maine statutes. R. S. c. 49, sect. 62. *Dolbier v. Agricultural Ins. Co.* 67 Me. 180. 1877.

§ 25. An injunction restraining the receiving of a claim under a policy does not affect nor suspend the limitation clause. Suit must be brought within time limited. *Wilkinson v. First National Fire Ins. Co.* 72 N. Y. 499. 1878. *Aff'g 9 Hun, 522.*

§ 26. The section of Code (406) saving rights of parties stayed by injunction, has no application where the limitation is prescribed by contract of the parties. *Wil-*

kinson v. First National Fire Ins. Co. 72 N. Y. 499. 1878.  
Aff'g 9 Hun, 522.

§ 27. The "loss occurs" at time property is destroyed, and limitation then begins to run. Johnson v. Humboldt Ins. Co. 91 Ill. 92. 1878.

§ 28. Policy provided that no action should be sustainable unless commenced within twelve months next after "the loss shall occur." *Held*, the loss should be deemed to "occur" when the company pays it, or is lawfully called upon to pay it. That the limitation did not begin to run until the loss became due and payable. Hay v. Star Fire Ins. Co. 77 N. Y. 235. 1879. S. P. Mix v. Andes Ins. Co. 9 Hun, 397. 1876. Rev'd 74 N. Y. 53, on another point. Steen v. Niagara Fire Ins. Co. 12 N. Y. Weekly Dig. 3. 1881. N. Y. Sup.

§ 29. There can be no waiver of limitation clause by acceptance by company's attorney of costs in a former action discontinued; nor by an extension of time to make case and exceptions; nor by his insisting upon previous trial that plaintiff's remedy was in equity and not at law. Arthur v. Homestead Fire Ins. Co. 78 N. Y. 462. 1879.

§ 30. Promises of settlement and statement to assured that there was no need of proceeding in court, will excuse discontinuance of a pending suit, and prevent company from availing itself of limitation clause in a suit brought subsequently. Home Ins. Co. v. Myer, 93 Ill. 271. 1879.

§ 31. When company has the option to rebuild, *Sembles* the period prescribed for the commencement of a suit does not commence to run until company has determined not to rebuild, as claim does not ripen into a money demand until after that time. Westchester Fire Ins. Co. v. Dodge, 9 Ins. L. J. 909. 1880. Mich.

See Agent, § 37. Mutual Company, 15, 55, 61. Parol Contract, 17. Proofs of Loss, 48, 74. Waiver, 5, 85. Warranty and Representation, 27.

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## MORTGAGOR AND MORTGAGEE.

§ 1. The liability of company to a mortgagee to whom the loss is made payable, cannot be reduced by the fact that the former has ample security in the value of the land. *Rex v. Ins. Co.* 2 Phil. Rep. 357. 1859.

§ 2. A mortgagee who has obtained a policy upon his interest as such, ceases to have any interest upon foreclosure and purchase under a decree of sale. *Gaskin v. Phenix Ins. Co.* 6 Allen, N. B. 429. 1866.

§ 3. If a mortgagee to whom loss is payable receives anything from sale of the property insured, after the fire, it should be deducted from the amount due under the policy. *Harris v. Gaspee Fire Ins. Co.* 9 R. I. 207. 1869.

§ 4. Policy provided that it should be paid to a mortgagee "whenever and as soon as his lien upon said property, by virtue of said mortgage, is established by decree of court or otherwise;" *Held*, to enable mortgagee to recover it was not necessary to establish a lien upon the whole property covered by the insurance, but that if there was a lien decreed covering two-thirds or even one-third, it was sufficient, it being equal in value to the amount of the insurance; in such a case, company is not liable for interest until such lien is decreed. *Harris v. Gaspee Fire Ins. Co.* 9 R. I. 207. 1869.

§ 5. The insertion of a clause in the policy, making loss payable to a mortgagee or other third party, does not change the relations of the parties, and insurance is liable to be defeated by any breach of its conditions by the assured. *Livingstone v. Western Ins. Co.* 16 Grant Ch. 9. 1869. *Van Buren v. St. Joseph Ins. Co.* 28 Mich. 398. 1873. *Griswold v. American Cent. Ins. Co.* 70 Mo. 654. 1874. *Flaherty v. Germania Ins. Co.* 7 Ins. L. J. 226. 1875. *Pa. State Ins. Co. v. Maackens*, 9 Vroom,

L. R. 564. 1876. Smith v. Union Ins. Co. 120 Mass. 90. 1876. Mervin v. Star Fire Ins. Co. 7 Hun, 659. 1876. Aff'd (without opinion) 72 N. Y. 603. Brunswick Savings Inst v. Commercial Union Ins. Co. 68 Me. 313. 1878. Fitchburg Savings Bank v. Amazon Ins. Co. 125 Mass. 431. 1878. Continental Ins. Co. v. Hulman, 92 Ill. 145. 1879. Humphrey v. Hartford Ins. Co. 15 Blatch. 523. 1879. Warbasse v. Essex Co. Mut. Ins. Co. 13 Vroom, L. R. 203. 1880. Lias v. Roger Williams Ins. Co. 9 Ins. L. J. 154. 1880. U. S. Circuit, N. H. Baldwin v. Phoenix Ins. Co. 10 Ins. L. J. 32. 1881. N. H.

§ 6. When policy insured owner and mortgagor, loss payable to a mortgagee, the interest of the former is insured, and he may maintain an action in his own name for use of the mortgagee. Illinois Fire Ins. Co. v. Stanton, 57 Ill. 354. 1870.

§ 7. When a mortgagor is bound by the mortgage to keep premises insured for benefit of mortgagee, and does in fact keep them insured by a policy which contains no statement that the mortgagee has any interest therein, the latter will, notwithstanding, have an interest in and a lien upon the money due under the policy enforceable in equity. Re Sands Ale Co. 3 Biss. 175. 1872.

§ 8. Where insurance is obtained by a mortgagee under authority contained in the mortgage, at expense of the mortgagor, it is held for the benefit and protection of both parties; the implied obligation arising is that the insurance money, when paid to the mortgagee, shall apply upon the mortgage debt. Waring v. Loder, 53 N. Y. 581. 1873.

§ 9. Whether company can compel an assignment of the mortgage held by a mortgagee to whom the loss is made payable, *query?* Reesor v. Provincial Ins. Co. 33 Up. Can. Q. B. 357. 1873.

§ 10. When the insurance is upon the interest of the mortgagee at his own expense, with no agreement or understanding with the mortgagor, the insurance is not upon

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the debt; it is the *property* which is insured, and the protection to the debt is only a sequence. Hence for a loss to the property the company is liable irrespective of the value undestroyed, notwithstanding it may equal amount of mortgage debt. *Excelsior Fire Ins. Co. v. Royal Ins. Co.* 55 N. Y. 343. 1873.

§ 11. When the interest of the mortgage was insured, and it appeared that such interest was acquired under a contract to purchase a mortgage for a certain sum, only a portion of which was paid at time of fire. *Held*, assured could recover to full extent of interest as contracted for, being the full amount secured by and unpaid upon the mortgage. *Excelsior Fire Ins. Co. v. Royal Ins. Co.* 55 N. Y. 343. 1873.

§ 12. Money received by a mortgagee to whom loss is payable takes the place of property destroyed, and is still collateral until applied in payment by mutual consent, or by some exercise by the mortgagee of the right to demand payment of the debt, and upon default of payment to convert the securities. In such a case the owner of a second mortgage has no right in equity to insist that the insurance shall be applied in reduction of the first mortgage. *Gordon v. Ware Savings Bank*, 115 Mass. 588. 1874.

§ 13. An insurance company which has issued a policy, loss being made payable to a mortgagee to the extent of his interest is not a proper party to a suit brought by the latter to obtain a reformation of the mortgage. *Newman v. Home Ins. Co.* 20 Minn. 422. 1874.

§ 14. A mortgagee has no lien upon insurance money due and paid to owner and mortgagor unless he has filed notice as required by statute. (R. S. ch. 49, sec. 32, Me.) *Burns v. Collins*, 64 Me. 215. 1874.

§ 15. A purchaser of property subject to a mortgage cannot surrender a policy previously obtained by the owner and existing for the benefit and security of the mortgagee and take a new policy in his name to prejudice

of the latter. In such case, if the building burns, the mortgagee has an equitable lien and claim upon the insurance money due under such policy. The stipulation in the mortgage binding the mortgagor and owner to keep property insured for the benefit of the mortgagee is in equity a sort of adjunct to the mortgage, and is binding on the mortgagor and on all others in his shoes with notice. *Miller v. Aldrich*, 31 Mich. 408. 1875.

§ 16. When the mortgagor is bound to keep the premises insured, and in case he does not, mortgagee is authorized to effect the insurance, the premiums to be charged against the former upon payment of the loss, the amount received is applied in reduction of the mortgage, company is not entitled to subrogation. *Provincial Ins. Co. v. Resser*, 21 Grant Ch. 296. 1874. But see *Westmaccott v. Hawley*, 22 Grant Ch. 382. 1875.

§ 17. The rights of parties to an insurance compact are fixed; at the time of the fire. The foreclosure of a mortgage held by a party to whom the loss is payable cannot operate to defeat his right to recover the amount which remained due on the mortgage. *Hadley v. Ins. Co.* 55 N. H. 110. 1875.

§ 18. Person to whom loss is payable holds subject to the conditions of the policy and under a liability to have his rights defeated by a breach of the condition by the assured. If suits by both parties be pending, the court by virtue of its equitable control over action, may so control the litigation that it may not be made vexatious. *State Ins. Co. v. Maackens*, 9 Vroom, N. J. L. R. 564. 1876.

§ 19. When policy is issued to a mortgagor of personal property, loss, if any, payable to mortgagee, after title of latter has become absolute at law by terms of the mortgage, and notice of amount due is filed as prescribed by the statute, the insurance is not limited to value of the equity of redemption, but covers the entire property. *Smith v. Exchange Fire Ins. Co.* 8 Jones & Sp. 492. 1876.

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§ 20. Policy insured owner and mortgagee "as interest may appear," loss, if any, first payable to latter. Believing defendant to be insolvent, the latter insured his interest as mortgagee in another company, and consented to cancellation of policy in suit. After the fire the owner repaired and restored building insured as it was previous thereto. *Held*, that mortgagee had no authority to consent to cancellation; that as building had been restored he had sustained no loss or damage, which was payable to the owner alone. *Matter of Moore*, 6 Daly, 541. 1876.

§ 21. Property insured was mortgaged to plaintiff to secure \$99,000. Policy insured his interest as mortgagee. Assured agreed to sell the mortgage for \$62,000, by an executory written contract, and at time of fire had received on account of the same, \$20,000. Purchaser had agreed to keep property insured but had not done so. The insurance in question was procured and paid for by the plaintiff himself. Company claimed that the interest of the plaintiff was limited to the difference between the \$60,000, at which he had agreed to sell the mortgage and amount received, \$20,000, or \$40,000, and that it was liable for its proportionate share of such amount only. *Held*, untenable; that an executory contract to convey a mortgagee's interest does not deprive him of his right to insure or limit his recovery to amount of unpaid purchase-money, nor is the result affected by the fact that purchaser of the mortgage was responsible for the premium, and the amount could be treated as paid by him. *Haley v. Manufacturers' Ins. Co.* 120 Mass. 292. 1876.

§ 22. Under usual covenant in mortgage authorizing mortgagee to effect insurance, the premiums paid by him may be added to the mortgage debt. *Leland v. Collver*, 34 Mich. 418. 1876.

§ 23. A mortgagee to whom loss is made payable with special "mortgagee clause or agreement," has no right to consent or authorize cancellation of policy as against the assured. *Matter of Moore*, 6 Daly, 541. 1876.

§ 24. When party to whom loss is made payable has

received before action is commenced an assignment of the whole right of action under the policy, he is entitled absolutely to the whole proceeds of the insurance, and it is immaterial that the debt which the assured owed the plaintiff was paid in part pending the litigation. *North-western Mutual Life Ins. Co. v. Germania Fire Ins. Co.* 40 Wis. 446. 1876.

§ 25. Where loss is made payable to third party, a mortgagee, the owner and assured cannot maintain an action to recover a loss, while the mortgagee is unpaid. *Roussel v. St. Nicholas Ins. Co.* 9 Jones & Sp. 279. 1876.

§ 26. Policy about expiring plaintiff paid local agent premium for renewal, and received a renewal receipt. About same time the mortgagees in another place to whom policy had been assigned to extent of their interest, anxious to have policy renewed, applied to another agent. By company's mistake a new policy was made out in name of the mortgagees as owners. It remained in office of local agent until after the fire. Company settled with the mortgagees by paying the amount of their interest. Action being brought by the owner and assured under original policy upon the renewal contract. *Held*, that plaintiff could not be prejudiced by mistake of the company in issuing policy to the mortgagees, that he was entitled to recover upon the completed contract of renewal the amount of the policy less the amount paid to the mortgagees. *Akin v. Liv., L. & G. Ins. Co.* 6 Ins. L. J. 341. 1877. U. S. Circuit, Ark.

§ 27. Where loss is made payable to a mortgagee who brings suit upon the policy, evidence of admissions made by the owner and assured *after* the fire is not admissible. *Browning v. Home Ins. Co.* 71 N. Y. 508. 1877.

§ 28. The authority conferred by a mortgage upon the mortgagee to procure insurance, does not prevent the latter from obtaining an insurance upon *his interest as mortgagee*; and in such case the company is entitled to the benefit of a provision in its policy for an assignment of the mortgage and subrogation. *Foster v. Van Reed*, 70 N. Y. 19. 1877. *s. r. Dick v. Franklin Fire Ins. Co.* 10 Ins. L. J. 468. 1881. Mo.

§ 29. A creditor or mortgagee who obtains a policy for his own protection at his own instance on his debtor's property is not liable to account to the debtor for the money paid in case of fire. *Archambault v. Galarneau* 22 L C. Jurist, 105. 1877.

§ 30. By mortgage clause attached to policy, issued in name of owner and mortgagor, company agreed that "the insurance, as to the interest of the mortgagee only, should not be invalidated by any act or neglect of the mortgagor or owner, &c.," with provision for subrogation and assignment. In an action upon the policy brought by the mortgagee. *Held*, that this clause operated as an independent insurance of the mortgagee's interest, and that defendant could not set up any defense based upon any act or neglect of the mortgagor, whether committed before or after the issue of the policy, or the making of the agreement between the company and the mortgagee. That plaintiff was unaffected by additional insurance on interest of the mortgagor, of which he was ignorant, and had no interest in, and defendant could not therefore avail itself of contribution clause. *Hastings v. Westchester Fire Ins. Co.* 73 N. Y. 141. 1878. *s. p. Hartford Fire Ins. Co. v. Olcott*, 97 Ill. 439. 1877. And in similar case policy being forfeited to mortgagor, a company is entitled to subrogation. *Ulster Co. Ins. v. Leake*, 73 N. Y. 161. Rev'd 11 Hun, 515.

§ 31. Where loss, if any, is made payable to a mortgagee, the exercise of the option to rebuild on part of company by giving notice to that effect, the contract to insure is superseded by a building contract, and the title to the cause of action founded upon it is in the assured and not in the mortgagee. Hence company not liable to an action by the latter. *Heilmann v. Westchester Fire Ins. Co.* 75 N. Y. 7. 1878.

§ 32. A mortgagee who is not a party nor privy to the contract of insurance by a mortgagor can claim no benefit under it. The former cannot prevent company from exercising its option to rebuild. *Stamps v. Commercial Fire Ins. Co.* 7 Ins. L. J. 256. 1878. N. C. 77 N. C. 209.

§ 33. A mortgagee who has obtained insurance without knowledge or consent of the owner in latter's name, with loss made payable to former as interest may appear, is not affected by a prior policy obtained by the owner upon his interest. *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121. 1878. But see *Continental Ins. Co. v. Hulman*, 92 Ill. 145. 1879.

§ 34. When policy is obtained by a mortgagor insuring his interest exclusively in the building and also a certain amount on his personal property, there being no facts that would justify an inference that it was obtained in pursuance of condition in the mortgage requiring him to keep insurance for the benefit of the mortgagee. *Held*, that the latter has no equitable lien upon a policy and insurance money thus obtained. *Stearns v. Quincy Ins. Co* 124 Mass. 61. 1878.

§ 35. Assignee of mortgage is entitled to same rights as the mortgagee in regard to insurance premiums advanced or paid by him on mortgagor's default to keep insurance according to his covenant. *Montague v. Boston and Albany R. R.* 124 Mass. 242. 1878.

§ 36. A mortgagee to whom loss is payable is not bound by an adjustment of a loss made with the assured. *Harrington v. Fitchburg Ins. Co.* 124 Mass. 126. 1878.

§ 37. Incompetent for mortgagee, to whom loss is payable, and who brings an action, to prove by parol evidence that company intended to insure plaintiff's interest as mortgagee. *Fitchburg Savings Bank v. Amazon Ins. Co.* 125 Mass. 431. 1878.

§ 38. The mortgagee takes an assignment of the policy subject to the liability of its being rendered void by acts of the assured and mortgagor. *Mechanics Society v. Gore District Ins. Co.* 3d Tupper, 151. 1878. Rev'g 40 Up. Can. Q. B. 220.

§ 39. If mortgagor is bound by agreement to insure mortgaged property for better security of the mortgagee, the latter has an equitable lien upon a policy taken out

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by the mortgagor to extent of the mortgagee's interest, and this equity exists notwithstanding clause authorizing insurance to be procured by the mortgagee. Wheeler v. Ins. Co. 11 Otto, 439. 1879.

§ 40. A mortgagor has no claim against the mortgagee for the amount of a return premium on a policy obtained by the latter for his security under the terms of the mortgage and canceled on account of the sale of the property unless actually paid to him by the insurance company. Parker v. Smith Charities, 127 Mass. 499. 1879.

§ 41. A second policy obtained by owner and mortgagor will defeat an action upon a prior policy by the mortgagee, to whom loss was made payable. Continental Ins. Co. v. Hulman, 92 Ill. 145. 1879.

§ 42. Policy insured owner, loss, if any, payable to mortgagee, with "mortgagee clause" attached. There was other insurance procured by the owner. The whole loss amounted to \$2,788 44, and the amount due under former policy as adjusted, was \$1,507 69. But as mortgagee was not affected by the other insurance, the company paid him the amount of his mortgage, \$3,000, and brought action to foreclose it. It was claimed on part of owners that company was bound to credit the whole \$2,788 44 as a payment upon the mortgage. Plaintiff claimed that it was only bound to credit the \$1,507 69, being the portion of the loss for which, as between it and the owner, it became liable. Held, that the latter was correct. Phoenix Ins. Co. v. Floyd, 19 Hun, 287. 1879.

§ 43. If a mortgage held by the party to whom the loss is made payable as additional security, is paid, the mortgagee can transfer no rights to the policy and insurance by assignment. Kanady v. Gore District Mut. Fire Ins. Co. 44 Up. Can. Q. B. 261. 1879.

§ 44. *Semble* that where the policy is made payable to the mortgagee that the legal title to the policy vests upon its execution in him. Appleton Iron Co. v. British America Assurance Co. 46 Wis. 23. 1879.

§ 45. The rights of a mortgagee to whom loss is payable, cannot be affected by death of the assured. *Westchester Fire Ins. Co. v. Dodge*, 9 Ins. L. J. 909. 1880. Mich.

§ 46. Mortgagee obtained policy upon his interest as such under and by virtue of an agreement with the owner and mortgagor that the insurance should be applied for benefit of latter in reduction of the mortgage debt. Previous insurance had been upon interest of owner with loss payable to mortgagee. The mortgagee was not aware that this policy was different until after the fire, when he delivered it to the mortgagor and at same time notified the company in writing that the insurance was for benefit of the owner. Building was repaired by the mortgagor. *Held*, that there was an equitable assignment of the policy to the owner who could maintain action in his own name; that the repairing of the property and fact that the security afforded by the mortgage was unimpaired by the fire constituted no defense; and that company could not be subrogated to mortgagee's interest. *Aetna Ins. Co. v. Baker*, 10 Ins. L. J. 275. 1880. Ind.

§ 47. Where a mortgagee insures property by authority of mortgagor and charges him with expense, any insurance recovered should be accounted for. Otherwise, when it is obtained on mortgagee's own account only. If insurance is collected under a policy in which it is agreed between the insured and insurer that the company, in case of loss, should be subrogated to right of the mortgagee, the insurance is not in fact on the mortgagor's account, nor is it such an insurance as could be made available to him. *Stinchfield v. Milliken*, 71 Me. 567. 1880.

§ 48. Policy insured a mortgagee upon his interest but by agreement, which existed for the benefit of the owner and mortgagor, the money received thereunder was to be applied to the reduction of the mortgage debt. In a suit brought upon such policy, *Held*, that it was no defense that the real estate was security for the mortgage debt, or that the building insured had been repaired and rebuilt. *Aetna Ins. Co. v. Baker*, 71 Ind. 102. 1880.

§ 49. If a mortgagor in the mortgage has agreed to effect an insurance upon the mortgaged property for the benefit of the mortgagee, the latter has an equitable lien upon the money due under the policy, in case of loss, to the extent of his interest. And this is so whether the policy is issued to and made payable to him, or it be taken in name of mortgagor and no reference is made in it to the mortgagee, for equity would in such case presume policy was obtained in pursuance of the agreement in the mortgage, and would so treat it. *Dunlop v. Avery*, 23 Hun, 509. 1881.

See *Alienation*, § 12, 60. *Assignment*, 15, 17. *Cancellation*, 18, 14, 15. *Contribution*, 15, 17. *Examination*, 2. *Evidence*, 27. *Interest in Policy*, 1, 9, 18, 26. *Mutual Company*, 71, 97, 108, 144. *Other Insurance*, 47, 49. *Proofs of Loss*, 74, 75, 82. *Renewal*, 4. *Subrogation*, 4. *Who May Sue*, 1, 6, 8, 11, 15, 17, 18.

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## MUTUAL COMPANIES.

§ 1. When mutual company with knowledge of the existence of other insurance makes and collects an assessment upon a certain policy, it operates as a waiver of such defense. *Lycoming Mutual Ins. Co. v. Stocklomn*, 3 Grant Cas. 207. 1856.

§ 2. Assured in mutual company has right to look to entire capital—that is, whole amount of premium notes taken—for his indemnity, instead of being limited to the capital of that class of risks in which his policy may have been placed. *Fitzpatrick v. Troy Ins. Co.* 5 Biss. 48. 1857.

§ 3. When the original notice of assessment is lost and it appears that but one form was used for all such notices, proof that one of that form was sent is competent mode of proof. *Fogle v. Lycoming Mutual Ins. Co.* 3 Grant Cas. 77. 1860.

§ 4. The fact that a loss has been paid with borrowed money does not prevent subsequent assessment for the same loss. *Tobey v. Russell*, 9 R. I. 58. 1868.

§ 5. When receiver is authorized by statute to make an allowance for equitable claims, the mere fact of an assessment being excessive does not render it void. *Tobey v. Russell*, 9 R. I. 58. 1868.

§ 6. Premium note may be made payable "at such times as the directors may require," and becomes due and payable upon such requirement. *Gaytes v. Hibbard*, 5 Biss. 99. 1869.

§ 7. When mutual policy has been absolutely assigned with consent of the company, the original assured cannot maintain an action in his own name. *Fitzgerald v. Gore Mut. Fire Ins. Co.* 30 Up. Can. Q. B. 97. 1870.

§ 8. Assured taking policy of a mutual company, authorized to transact business as a stock company, and paying premium in cash, cannot be held to be a member. *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354. 1870. s. p. When premium is paid part cash and part note. *Farmers' Ins. Co. v. Smith*, 63 Ill. 188. 1872.

§ 9. Insolvency of company is no defense to an action on a note given for a premium. *Cary v. Nagel*, 2 Biss. 244. 1870.

§ 10. *Semblé*, assignee of a mutual policy does not become a member of the company so as to entitle him to give notice of loss and furnish the particular account required by the conditions of the policy. *Fitzgerald v. Gore Mut. Fire Ins. Co.* 30 Up. Can. Q. B. 97. 1870.

§ 11. The non-payment of premium given by the original insured, who has assigned a policy to a third party with the consent of the company, cannot be set up as a defense to an action upon the policy brought by the assignee. Statute voids the policy only in the hands of the person in default. *Storms v. Canada Mut. Ins. Co.* 22 Up. Can. C. P. 75. 1871.

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§ 12. A mutual company must aver compliance with certain steps required to be taken by statute in reference to notice of assessment before a plea founded upon non-payment can be made available. *Crowley v. Agricultural Mut. Ins. Co.* 21 Up. Can. C. P. 567. 1871.

§ 13. An assessment upon an alleged lost note cannot be sustained without proof of its having existed at some time unpaid and uncanceled. *Re Slater Mut. Fire Ins. Co.* 10 R. I. 42. 1871.

§ 14. An assessment cannot be avoided by the fact that it was made upon and included parties who were not liable. *Re Slater Mut. Fire Ins. Co.* 10 R. I. 42. 1871.

§ 15. When premium note provides that it is due and payable at such times and by such installments as might be assessed, the statute of limitations does not begin to run against it until an assessment has been made thereon. *Re Slater Mut. Fire Ins. Co.* 10 R. I. 42. 1871.

§ 16. Insolvency of company no defense to an action upon premium note. *Graff v. Simmons*, 58 Ill. 440. 1871.

§ 17. A receiver of a mutual company must comply with the statute in making an assessment on the premium notes. *Embree v. Shideler*, 36 Ind. 423. 1871. *s. p.* *Manlove v. Burger*, 38 Ind. 211. 1871. *Manlove v. Naylor*, *Id.* 424. 1871. *Whitman v. Mason*, 40 Ind. 189. 1872.

§ 18. The Indiana statute (1 G. & H. 396) in regard to personal liability of directors of mutual companies, is penal in its nature and must be strictly construed; and such liability can only exist when a judgment has been recovered upon a policy, and not upon a note taken in settlement of a loss on exchange and surrender of a policy. *Raber v. Jones*, 40 Ind. 436. 1872.

§ 19. A premium note given to a foreign insurance company which has not complied with the laws precedent to its admission to the State, is void. *Hoffman v. Banks*, 41 Ind. 1. 1872.

§ 20. A condition that company shall not be liable for a loss occurring when note given for the premium is due and unpaid, is valid and binding. Its force and effect cannot be avoided by showing that note was taken in payment for cash premium, and that further credit was stipulated by concluding words of the note, "with interest at ten per cent. after due." *Watrous v. Miss. Valley Ins. Co.* 35 Iowa, 582. 1872.

§ 21. Assessment with knowledge of forfeiture waives it. *McKenzie v. Fire Ins. Co.* 9 Heiskell, 261. 1872.

§ 22. A mutual insurance company which in addition to its usual business issued policies both the premium, and loss, if any, payable in gold, is not bound to pay dividends upon such policies in gold. *Luling v. Atlantic Mutual Ins. Co.* 51 N. Y. 207. 1872.

§ 23. The form of a note given to a mutual insurance company is not conclusive; the question whether it was a premium or stock note may be established by circumstances attending its making and delivery and is a question of fact for the jury. *Jackson v. Van Slyke*, 52 N. Y. 645. 1873.

§ 24. The liability of member of a mutual company upon premium note cannot be extended beyond the original limit by any amalgamation of the company with another, or by any dealings or contract between them to which he is not a party. *Beaver Ins. Co. v. Trimble*, 23 Up. Can. C. P. 252. 1873.

§ 25. When policy states that it is issued in consideration of a note made by the assured the acceptance of a note signed by another, waives right of the company to a note signed by the former. When policy of a mutual company provides that a failure to pay premium note shall defeat the insurance, a waiver of such clause to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop the party from insisting on the performance of the contract or forfeiture of the

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condition. *Muhleman v. National Ins. Co.* 6 W. Va. 508. 1873.

§ 26. In absence of proof of order or requirement by directors for payment, and that losses and expenses have occurred in recovery can be had on a premium note. *Warner v. Beem*, 36 Iowa, 385. 1873.

§ 27. Notwithstanding mutual company may waive condition as to prepayment of premium, such waiver does not extend to a stipulation in the contract providing that company shall not be liable for loss occurring when note is unpaid and past due. *Ferebee v. N. C. Mutual Home Ins. Co.* 68 N. C. 11. 1873.

§ 28. A premium note may be compromised by agent of a mutual company after filing petition for dissolution and before publication of notice of appointment of receiver. The word "transfers" in the provisions of the Statute 2 R. S. (N. Y.) 469, sec. 71, which declares void all transfers, &c., made after filing of a petition for dissolution does not apply to such a case. *Sands v. Hill*, 55 N. Y. 18. 1873.

§ 29. Neither insolvency of the corporation, nor cancellation of its policies will deprive the company of the right, or relieve its officers of the duty, to assess, upon those who were members, all losses that occurred while they were members. *Commonwealth v. Massachusetts Ins. Co.* 112 Mass. 116. 1873.

§ 30. The liability to assessment at any time, within the limit fixed by the statute, is measured only by the amount of the losses for which the company is then responsible. It is not apportionable according to the ratio of time of the expired and the unexpired term of the policy. In case of insufficiency "a just average shall be made to the sufferers," each one receiving a share of the fund in proportion to the amount of his loss. This rule does not permit a set-off between the company and those who have claims for losses upon which they are entitled to a distributive share of the proceeds of the assessment.

Upon the same grounds the fund thus pledged to make good losses by fire cannot be reduced by allowing claims of this nature, in favor of other members who have not suffered loss, to participate in the distribution, and thereby defeat or impair the promised indemnity. Commonwealth v. Massachusetts Ins. Co 112 Mass. 116. 1873.

§ 31. Assignees of a policy, who have been substituted to all the rights of the original assured, with the assent of the company thereby become members, and are liable to assessment. Commonwealth v. Massachusetts Ins. Co. 112 Mass. 116. 1873.

§ 32. When the company has become insolvent and placed in hands of receiver, assured is entitled to have the amount due from him to the company applied in payment of a loss due to him under its policy, and to prove against the assets of the company for the balance if any. Commonwealth v. Shoe and Leather Ins. Co. 112 Mass. 131. 1873.

§ 33. Under Gen. Sts. c. 58, sects. 48, 54 (Mass.), the deposit notes should first be exhausted before resorting to the further liability imposed by law upon the policyholders as members of the corporation. Commonwealth v. Monitor Ins. Co. 112 Mass. 150. 1873.

§ 34. Under Gen. Sts. c. 58, sect. 54 (Mass.), cancellation of policy does not relieve holder from liability to assessment for losses occurring while he was a member, if made within two years. Commonwealth v. Mechanics' Ins. Co. 112 Mass. 192. 1873.

§ 35. An assessment cannot be made for purpose of repaying unearned premiums. Commonwealth v. Mechanics' Ins. Co. 112 Mass. 192. 1873.

§ 36. In an action upon a premium note the declaration setting forth its general tenor and effect, the fact that it is in the German language will not constitute a variance. Williams v. German Mut. Fire Ins. Co. 68 Ill. 387. 1873.

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§ 37. By-law of mutual company provided that not more than three-fourths of the actual cash value should be insured. Subsequently it was agreed "to avoid all doubt and difficulty in case any loss should occur to our respective properties by fire, we will only claim and receive three-fourths of the amount of the actual loss, provided three-fourths of the amount as aforesaid does not amount to more than three-fourths of the sum insured." Three-fourths of the actual loss amounted to more than three-fourths of the sum insured." *Held*, the agreement to be inapplicable and that the assured was entitled to recover the whole sum insured which was three-fourths of the actual value, and that the agreement was not intended to reach the case of a total loss already provided for sufficiently by the by-law first above mentioned. Farmers' Mutual Ins. Co. v. Graybill, 74 Pa. 17. 1873.

§ 38. The members of a mutual company are presumed to know the conditions and by-laws affecting insurance. Lattomus v. Farmers' Mut. Ins. Co. 3 Houston (Del.), 404. 1873.

§ 39. When the by-law of a mutual company requires that the application for insurance shall be signed by the applicant, the mere fact of his signing the application gives the company the right to assume the truth of his representation. Va. Buren v. St. Joseph Ins. Co. 28 Mich. 398. 1873.

§ 40. Secretary leaving a written or verbal notice of meeting for a director at his place of business, with his brother, is sufficient notice to sustain the action of the meeting in such director's absence in making an assessment. By-laws required such notice "to be given by mail, or in other ways." Williams v. German Mut. Fire Ins. Co. 68 Ill. 387. 1873.

§ 41. Member of mutual company is liable only for proportion of loss and expenses accruing while his policy is in force. Greene v. Beaver & Toronto Fire Ins. Co. 34 Up. Can. Q. B. 78. 1873.

§ 42. Assured held an interim receipt which provided that the company "shall have power to cancel this contract at any time within thirty days from its date, by causing a notice to that effect to be mailed to the applicant," at a certain address. Company mailed to the applicant such notice within thirty days, but it was not received in time for delivery at the post office to which it was addressed until after the fire. *Held*, that the mailing of the notice was not sufficient to cancel the insurance. *Tough v. Provincial Ins. Co.* 20 L. C. Jurist, 168. 1874. *Revg 17 L. C. Jurist*, 305. *s. p. Goodwin v. Lancashire Fire Ins. Co.* 18 L. C. Jurist, 1. 1873.

§ 43. Where a mutual company issue policies for cash premiums, with which losses are paid, these facts must be taken into consideration and allowance made therefor in making assessment upon premium notes. *Sands v. Graves*, 58 N. Y. 94. 1874.

§ 44. The provisions of a statute requiring publication of notice of assessment upon premium notes, are not merely directory; compliance therewith must be shown. *Sands v. Graves*, 58 N. Y. 94. 1874.

§ 45. A valid assessment upon maker of premium note must be based upon an actual prior examination and determination of amount of losses and expenses, and whole amount of notes liable to assessment, and the omission cannot be supplied by proof upon a trial showing that assessment would have been proper. *Sands v. Graves*, 58 N. Y. 94. 1874.

§ 46. A note given for premium is not a deposit note under R. S. ch. 49, sec. 26 (Me.). *Union Ins. Co. v. Greenleaf*, 64 Me. 123. 1874.

§ 47. The negotiability of a premium note is not taken away by indorsement upon its face "on policy No. 33,386," although the policy contains a provision for set-off of notes due company in case of loss. *Union Ins. Co. v. Greenleaf*, 64 Me. 123. 1874.

§ 48. In action brought by receiver upon premium note, declaration must show that court has examined and determined upon the validity of the claims against the company for payment of which assessment is made. The amount of claims which court will allow, together with any indebtedness previously allowed by the directors, as shown by their books, must be ascertained before an assessment can be made to pay such indebtedness. A member of the company is liable only to assessment for losses occurring while his policy is in force. *Downs v. Hammond*, 47 Ind. 131. 1874. *s. p. Embree v. Shideler*, 36 Id. 423. 1871.

§ 49. The application for insurance in mutual company was for insurance "on hay in the stack and in the field," and the policy read "on his hay in stack within fifty feet of stable." Assured claimed to rescind the contract of insurance as soon as the error was discovered. On a suit upon the note, *Held*, that the misdescription was immaterial; that the application being made a part of the policy, both must be construed together, and that hence the right of rescission did not exist. *Edwards v. Farmers' Ins. Co.* 74 Ill. 84. 1874.

§ 50. To make an assessment binding company must show a state of facts which authorizes the assessment to be made. *Planters' Ins. Co. v. Comfort*, 50 Miss. 662. 1874.

§ 51. Sale of property, taking back a mortgage for the whole of the purchase-money, is such an alienation as to render the insurance void, and relieve maker of note from liability to assessment for losses happening afterwards. *Miner v. Judson*, 5 T. & C. 46. 1874.

§ 52. Terms of a charter of a mutual company must be strictly complied with to effect a cancellation of policy. *Landis v. Home Mut. Ins. Co.* 56 Mo. 591. 1874.

§ 53. Charter of mutual company provided that the insured party should permit his claim for the loss to be adjusted, and that if not satisfied with the adjustment the question may be submitted to referees, or he may bring

an action against the company at the first court to be held in county specified, and not afterwards. *Held*, that the limitation applied only to cases where the party is not satisfied with the adjustment. It has no application at all where the company claims a total exemption. In such case the assured may resort to his remedy under the general law, and is only barred by the general statute of limitations. *Landis v. Home Mut. Ins. Co.* 56 Mo. 591. 1874.

§ 54. When a premium note in advance for the security of dealers is given at commencement of business and renewed at maturity, maker is liable to receiver of company in same manner as if the occasion for its use had arisen during the existence of the original note. *Howard v. Hinckley Co.* 64 Me. 93. 1874. And see in case of partners. *Maine Mut. Ins. Co. v. Blunt*, 64 Me. 95. 1874.

§ 55. An agent of company authorized to solicit risks obtained a policy for the assured, and executed and deposited a premium note in his name. Policy recited the giving of the note. Assured accepted and retained the policy without knowledge of the giving of the note. *Held*, that by the acceptance and retention of the policy assured adopted and ratified the act of the agent, and was liable on the note. *Monitor Mut. Ins. Co. v. Buffum*, 115 Mass. 343. 1874.

§ 56. When by the charter of a mutual company deposit notes are made and termed "the absolute funds of the company," liable and held pledged to pay expenses and losses and that in the event of such absolute funds being consumed, then each member should be liable to pay a certain assessment, the company is not obliged to show that an assessment has been duly made to entitle it to recover upon such a deposit note which is subject to be collected at any time in the discretion and under the direction of the directors. *Ins. Co. v. Moore*, 55 N. H. 48. 1874.

§ 57. Member of mutual company is not liable to assessment when his policy has been canceled by effect of a written notice from the secretary. *Columbia Ins. Co. v. Masonheimer*, 76 Pa. 138. 1874.

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§ 58. The form of a note given to a mutual company is not conclusive upon the question of its having been given as a stock or capital note. Such question is open to inquiry. *Sands v. Isaacson*, 56 N. Y. 662. 1874.

§ 59. The legal right to assess member of a mutual company must be clear on the face of the declaration, otherwise the latter will be held bad on demurrer. *Columbia Fire Ins. Co. v. Kenyon*, 8 Vroom, N. J. L. R. 83. 1874.

§ 60. Loss must occur during continuance of the policy to render assured liable to assessment. *Columbia Fire Ins. Co. v. Bolton*, 2 Pearson, 222. 1875.

§ 61. The statute of limitations does not begin to run in case of a deposit note until the laying of an assessment. *Bigelow v. Libby*, 117 Mass. 359. 1875.

§ 62. Misrepresentation of an agent cannot be set up in an action upon a premium note unless it is also averred that he had authority from the company to make the statement. *Pennsylvania Central Ins. Co. v. Kinley*, 2 Pearson, 229. 1875.

§ 63. Acceptance of the full amount of the premium after default and notice of a loss operates as a waiver of condition in the policy suspending liability during the time of such default. *Joliffe v. Madison Mutual Ins. Co.* 39 Wis. 111. 1875.

§ 64. A mere statement to the assured, or notice that unless assessment was paid by a specified future day that the policy would be annulled on that day, is a mere threat and does not of itself prevent company from making further assessment on a premium note given by the assured. *Joliffe v. Madison Mutual Ins. Co.* 39 Wis. 111. 1875.

§ 65. When mutual company is authorized to issue its policies for cash premiums to be paid into the common treasury, a member who thereafter becomes such on the mutual plan is liable to be assessed for losses occurring

under the cash policies. Hummel's App. 78 Pa. 320. 1875.

§ 66. A stockholder in an insolvent company cannot reduce his liability upon a stock note, by setting off amount due under an adjusted policy. Jenkins v. Armour, 6 Biss. 312. 1875.

§ 67. Condition of insurance in mutual company provided that whenever an assessment shall have been made upon the premium notes and the same is not paid within 30 days after being demanded, the policy should be null and void until the said assessment be paid, and that the directors should retain such premium notes and collect thereon such sum or sums so assessed. *Held*, that the effect of such condition was merely to suspend the benefit of the policy after 30 days default in payment until payment of the assessment is made either voluntarily or involuntarily; the company by the same section being authorized to retain a premium note to enforce collection. Hummel's App. 78 Pa. 320. 1875.

§ 68. It is not necessary to validity of an assessment that the company should have actual and accurate knowledge of the amount of claims against it. Such liability may be estimated. Hummel's App. 78 Pa. 320. 1875.

§ 69. Policy provided that if assessment was not paid within ten days after notice in writing has been left at assured's last and usual place of abode or business, it should be suspended until the same was paid. Also, that if assured should refuse to pay any assessment directors may terminate the risk by giving notice, &c. Assessment was made on all policies on account of the Boston fire in 1872. Plaintiff received notice of the assessment in due course of mail and also of resolution of directors that the policies of all holders should be canceled and notes canceled and returned if assessment was not paid in thirty days. Plaintiff received notice February 6, 1873, but did not pay the assessment; the company did no further act in regard to his policy; and July 4, 1873, property was destroyed by fire. Plaintiff contended that policy

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remained in force because it was not actually canceled according to resolution of the directors; also, that notice was not given as required by the by-law; and that he was excused from paying the assessment because the agent owed him on account of an old policy. *Held*, that the insurance was suspended by the force of the first by-law above-mentioned, and this was not affected by vote of the directors; that plaintiff having received notice in due time by mail and acted upon it must be deemed to have waived by-law as to notice, and that the excuse for non-payment of the assessment was not sufficient. *Hollister v. Quincy Ins. Co.* 118 Mass. 478. 1875.

§ 70. In a mutual company when losses occur which absorb the absolute funds, and require an assessment upon the contingent liability of the members, insured who have sustained losses are not entitled to interest thereon. *Commonwealth v. Mass. Ins. Co.* 119 Mass. 45. 1875.

§ 71. When a purchaser gives a mortgage for a part of the consideration and assigns to the mortgagee a policy of insurance in a mutual company with assent of the latter, the mortgagor remains as before a member of the company and the party liable to assessment. *Cummings v. Hildreth*, 117 Mass. 309. 1875.

§ 72. When contract of a mutual company provides that no person who shall have claimed the homestead exemption should be a member of the company, that such exemption is claimed by one of the members of a partnership insured does not affect validity of the policy. *West Rockingham Fire Ins. Co. v. Sheets*, 26 Grat. 854. 1875.

§ 73. An assignee of a mutual policy with consent of the company becomes a member and liable to assessments. *Cummings v. Hildreth*, 117 Mass. 309. 1875.

§ 74. Mutual policy contained conditions as follows: "Assignments of policies must be made within ten days after sale of property, and this policy sent to the office of the company forthwith for its consent, with fifty cents recording fee, and a new installment note signed by the as-

signee. Consent will then be given to the assignment." Property having been sold by the assured, he assigned the policy with consent of defendant's agent, by his direction, the agent having full knowledge of all the facts of the transfer. The agent promised to forward the policy to the secretary of the company, but failed to do so. *Held*, that there was not an assignment of the policy approved by the company as provided by the conditions of the policy; that the local agent was not authorized to act for the company in the approval of the transfer. American Ins. Co. v. Gallagher, 50 Ind. 209. 1875.

§ 75. Claims for losses due from company cannot be set off against notes given for capital stock. But when money is deposited with treasurer of company as a banker and not as treasurer, his losses may be set off against such deposit. Scammon v. Kimball, 5 Ins. L. J. 266. 1875. U. S. Sup. Ct.

§ 76. In a mutual office a member is not only entitled to recover for a loss during the limit of his policy, but he is also liable for his proper share of contribution to all others who lose during the term of his policy. The receipt of a total loss by the assured, and surrender of the policy, with no deduction on account of future losses, the premium note being retained by the company, does not terminate the liability of the assured upon the note. Boot & Shoe Mfg. Ins. Co. v. Melrose Society, 117 Mass. 199. 1875.

§ 77. An alienation of the property insured, which, under the terms of the policy may terminate the insurance, does not release the holder from his responsibility as a member and liability to assessment. Cumings v. Sawyer, 117 Mass. 30. 1875.

§ 78. The funds in hands of a receiver of mutual company are not liable to pay any losses which might occur after the judicial sequestration of the property of the company, and no part of such fund can be retained for purpose of meeting such losses. Commonwealth v. Mass. Ins. Co. 119 Mass. 45. 1875.

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§ 79. When there is a surplus fund in hands of receiver, resulting from fact that the directors made an assessment larger than was necessary for the purposes for which it was authorized, such money cannot be applied for purpose of paying value of unexpired policies or unearned premiums, but should be repaid to the members. *Commonwealth v. Mass. Ins. Co.* 119 Mass. 45. 1875.

§ 80. Liability of mutual company is absolutely suspended by the failure of the assured to pay note when due. *Gorton v. Dodge County Mut. Ins. Co.* 39 Wis. 121. 1875.

§ 81. Condition relieving company from liability while the assured is in default in respect to payment of premium is valid and will be enforced. *Joliffe v. Madison Mut. Ins. Co.* 39 Wis. 111. 1875. *s. p. Cranford County Mut. Ins. Co. v. Cochran*, 8 Ins. L. J. 549. 1879. Pa.

§ 82. Policy and note together form the contract. *Shultz v. Hawkeye Ins. Co.* 42 Iowa, 239. 1875.

§ 83. A condition that "if note is not paid within sixty days after its maturity, and suit should be brought thereon after such time, the commencement of such action should operate as an absolute cancellation of the policy, and the whole amount of the note should be deemed earned, due and payable, and that the collection of the note by legal proceedings should not operate as a waiver or have the effect to revive the policy," is valid and binding. *Shultz v. Hawkeye Ins. Co.* 42 Iowa, 239. 1875. *s. p. Shakey v. Id.* 44 Iowa, 540. 1876.

§ 84. Judgment of bankruptcy court assessing premium notes does not prevent the makers from setting up defenses as to their validity. *Lamb v. Lamb*, 6 Biss. 420. 1875.

§ 85. Company was authorized by its charter, "as additional security to its dealers, to receive notes for premiums in advance. As to third parties, they shall be deemed the absolute property of the company, and may be used for any purpose connected with its business. As

between the makers and the company they shall be liable merely to extent of premiums written, and for losses and liabilities after cash capital and other resources shall have been first exhausted." Such notes were also entitled to share in the profits. *Held*, that makers of such notes did not occupy relation of sureties to the company, but they did to its creditors, and that they were not discharged by any change lawfully made by company, although effect might be to decrease its assets. The word "exhausted" did not require a collection and sale and an actual application of all the other assets before resort could be had to the security notes. *Osgood v. Toole*, 60 N. Y. 475. 1875.

§ 86. Whether a note is given as a subscription note "for better security of those concerned," or as a premium note in advance for an open policy, is properly a question of fact to be determined by jury. In latter case defendant's liability was, by company's charter, limited to the earned premium. *Maine Ins. Co. v. Farrar*, 66 Me. 133. 1876. *s. p. Id. Co. v. Stockwell*, 67 Me. 382. 1877.

§ 87. A condition providing that company shall not be liable during the period premium note remains due and unpaid, is valid and will be enforced. *Forest City Ins. Co. v. School Directors*, 4 Bradwell, 145. 1876.

§ 88. Surrender of a policy of a mutual company is not effectual to relieve assured from liability on his premium note when delivered to a stranger, with notice to the agent of the company. *American Ins. Co. v. Woodruff*, 34 Mich. 6. 1876.

§ 89. Policy was made out and dated October 1, 1872, by mutual verbal agreement, but remained in company's office until November 14, 1872, upon which date assured called at the office and received the policy, at same time giving deposit note, but dating it October 1, 1872. The secretary, in answer to inquiry by assured, said that the company, in his opinion, would have a surplus of \$700,000; that, in his opinion, the office was sound and good, and would go on. About November 23, 1872, company was enjoined from continuing, and was subsequently put in

hands of a receiver. On November 18, 1872, directors voted that all premium notes should be paid immediately, and on April 23, 1873, an assessment was voted. Petition by assured in equity that company be restrained from collecting assessments upon policy and deposit note. Decree of dismissal and appeal. *Held*, that liability of the assured as member of the company attached on October 1, 1872, and that secretary's expression of his opinion afforded no ground of relief. Decree affirmed. Commonwealth v. Mechanics' Ins. Co. 120 Mass. 495. 1876.

§ 90. Part payment of a premium note will not operate as a waiver of condition avoiding policy for non-payment. Garlick v. Miss. Valley Ins. Co. 44 Iowa, 553. 1876.

§ 91. By-law provided that "if the assured shall neglect for the space of ten days, when personally called on, or after notice in writing had been left at his last and usual place of abode and business, to pay any assessment, the risk shall be suspended; and if the insured shall refuse to pay any assessment, or if for any other cause the risk is considered unequal or injurious, the directors may terminate same by giving notice in writing, &c." Notice of assessment was sent by mail, but was not received by assured. *Held*, that it was essential notice should be actually received by assured, or left at his place of abode or business, before it could be assumed that he had refused to pay an assessment, to render notice of cancellation effectual. Mullen v. Dorchester Mut. Fire Ins. Co. 121 Mass. 171. 1876.

§ 92. The validity of a premium note given as authorized by statute does not depend upon a mere question of consideration. The insolvency of the company and the fact that no insurance was obtained or existed do not constitute defenses. Howard v. Palmer, 64 Me. 86. 1874. And in such case, after payment of the note party has no claim for reimbursement on ground of the failure to provide insurance. Iron Co. v. Me. Mut. Ins. Co. 66 Me. 118. 1876.

§ 93. An assessment cannot be recovered by a foreign corporation when the insurance was effected in New Jersey through an agent, such agent not having complied with the statute in relation to foreign insurance companies. *Stewart v. Northampton Ins. Co* 9 Vroom, N. J. L. R. 436. 1876.

§ 94. Contract of a mutual company provided that the directors should ascertain and determine the amount of loss or damage, and that if the assured was not satisfied with such determination and brought suit, if he should recover less than the amount so determined he should be non-suited and the company recover its costs. Fire occurred October 23d, 1873. December 9th, 1873, the directors voted to pay the assured a certain amount, which was declined by the assured. On the 12th of January, 1874, the directors withdrew all offers previously made, and so notified the insured, who subsequently bringing suit and recovering less than the amount which had been previously offered. *Held*, the company, by withdrawing all overtures and propositions for a compromise, were estopped to say that they had determined the amount of damages, and that therefore plaintiff was entitled to judgment upon the verdict. *Simpson v. Ins. Co.* 57 N. H. 160. 1876.

§ 95. A member of a mutual company is liable only for assessment for losses which occurred during the life of his policy. *Stewart v. Northampton Mutual Ins. Co* 9 Vroom, N. J. L. R. 436. 1876.

§ 96. Collection of assessment recognizing the policy as an existing contract with knowledge of the facts waives forfeiture. *Witte v. Western Mutual Fire Ins. Co* 1 Mo. App. 188. 1876.

§ 97. *Semble*, that a mortgagee who becomes the assignee of a policy under the Mutual Insurance Act with consent of the company becomes the person insured by the company to the extent of his own interest, and if there is a loss is entitled to sue for indemnity in his own name; and that by the assignment and consent the mort-

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grantee requires a separate and independent interest in the policy, and while he is bound by everything prior to the assignment, as the mortgagor was himself bound, and continues bound by the general conditions after the assignment which he would have been bound by if he had taken out a new policy in his own name, he is not bound by the contract for further insurance made by the mortgage after the assignment of which the mortgagee had no notice or knowledge, and which he could not possibly guard against, nor by a second mortgage made by the owner by a further alienation in any manner of the property, nor by any act of that kind. *Mechanics' Building and Savings Society v. Gore District Mutual Fire Ins. Co.* 40 Up. Can. Q. B. 220. 1876.

§ 98. A mutual company cannot recover upon a premium note obtained from the assured by false representations of the agent, even although such agent had no authority to make the representations. *Lycoming Fire Ins. Co. v. Woodworth*, 83 Pa. 223. 1876.

§ 99. The effect of returning policy to assured after notification that the premises were used for certain purposes is to waive any forfeiture which had taken place by reason of such use, but it does not operate as an indefinite extension of the time of payment of premium note. Policy providing that if any part of the note should be due and unpaid at time of the loss, it should be void, assured cannot make an effectual tender of the amount due after a loss. *Wedrow v. Farmers' Ins. Co.* 7 Ins. L. J. 77. 1876. Iowa.

§ 100. An assessment including expenses and liabilities incurred before assured becomes a member of the company is invalid as against him. *Ins. Co. v. Chase*, 56 N. H. 341. 1876.

§ 101. Under a charter of a mutual company a power conferred which in its execution necessarily involves judgment and discretion cannot be delegated, and in such a case the directors cannot ratify what they could

not authorize under their charter. *Ins. Co. v. Chase*, 56 N. H. 341. 1876.

§ 102. If there is any evidence tending to show an alteration of any receipt given for the premium the question should be submitted to the jury. *Farmers' Mutual Ins. Co. v. Bair*, 82 Pa. 33. 1876.

§ 103. Company is bound to give notice of an assessment to the executor or legal representatives of the assured who has died, and in the absence of such notice, policy cannot be forfeited for non-payment of an assessment. *Guggisberg v. Waterloo Mut. Ins. Co.* 24 Grant Ch. 350. 1876.

§ 104. A premium note taken in Indiana by an agent of a mutual company which has not complied with the statute, is void. *Lamb v. Lamb*, 6 Biss. 420. 1875. But non-compliance with statute is no defense where it appears that the agent was not authorized to make contracts, but only to receive proposals, money or notes, and forward them to company's agent in another State. *Lamb v. Bowser*, 7 Biss. 372. 1877.

§ 105. Mutual company waives a forfeiture by demanding and receiving from the assured a subsequent assessment. *Lyons v. Globe Mut. Fire Ins. Co.* 27 U. S. C. P. 567. 1877.

§ 106. Premium note held negotiable. *McArthur v. Smith*, 1 Tupper, 276. 1877.

§ 107. Assured had applied for his insurance through an agent to whom he had given a note for the premium. Just after note was due assured wrote to company asking it whether it held the note or not, and to inform him whether policy was good, without agent having countersigned it. To which company replied, "Have yours of the 4th inst. This man Ferguson (the agent) is an impostor, and we are trying to get on his track, and may be able to write you further on this subject again. Your note never came here, and I advise you not to pay it, whoever should call on you for the same." *Held*, that com-

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pany was estopped from defense founded on non-payment of the note. Benson v. Ottawa Ins. Co. 42 Up. Can. Q. B. 282. 1877.

§ 108. A mortgagee to whom loss has been made payable by assignment, after payment of the mortgage, cannot maintain an action as trustee for the assured, policy being void as to the latter, for failure to pay assessment. Oxford Building Soc. v. Waterloo Ins. Co. 42 Up. Can. Q. B. 181. 1877.

§ 109. Assured was assessed in 1875 and again in 1876. Shortly thereafter assured obtained other insurance without notification or consent. On September 23d, 1876, assured was notified that unless he paid both assessments within thirty days his policy would be void. On October 17th, 1876, property was destroyed by fire, and on the 27th day of January following, company received the amount of both assessments. *Held*, not to constitute a waiver of condition in regard to other insurance, and *semble* that it could not be a waiver of forfeiture on ground of non-payment of the assessments. Lyons v. Globe Mut. Fire Ins. Co. 28 Up. Can. C. P. 62. 1877.

§ 110. When by-laws of mutual company require publication of notice of assessment it is essential to prove it before suit can be sustained against a member. Northampton Mutual Ins. Co. v. Stewart, 10 Vroom, N. J. L. R. 486. 1877.

§ 111. If company with knowledge of the existence of an encumbrance knowingly receives an assessment upon a note, such conduct is a waiver of the breach of warranty, whether so intended or not. On the other hand, if company receive such assessment under an erroneous idea that it is upon another and totally different note, its right to insist upon the forfeiture is unaffected by such payment and receipt. Southern Mutual Ins. Co. v. Yates, 28 Grat. 585. 1877.

§ 112. Neglect to pay assessment has the effect of suspending the protection of the policy until default is

removed. The fact that great indulgence was extended to delinquent members of the company and that the company was accustomed to receive assessments long after they were due, is entirely inconsistent with the fact that while the default continued the protection of the policy was suspended. A notice informing members that a penalty would be exacted if assessments were not paid by a certain time, furnishes no excuse for non-payment. *Washington Mutual Fire Ins. Co. v. Rosenberger*, 84 Pa. 373. 1871.

§ 113. Waiver of condition suspending policy during continuance of default in payment of an assessment, should not be inferred from a mere reminder in a notice that the assessment is unpaid. *Leonard v. Lebanon Mut. Ins. Co.* 7 Ins. L. J. 79. 1877. Pa.

§ 114. Action was brought upon a premium note. The company was an Illinois corporation. The note was made by the assured in Indiana and made payable to the company. An agent of the company in same place received the note and application for insurance which he forwarded to the company in Illinois. The note and application were received and accepted and policy was returned by mail to the assured. The agent was only authorized to receive and forward applications, and neither the company nor the agent had complied with the statute in regard to foreign companies. *Held*, no defense. *Bowser v. Lamb*, 6 Ins. L. J. 375. 1877. U. S. Circuit, Ind.

§ 115. Policy does not become absolutely void on non-payment of assessment, but is voidable only. Its operation is suspended during continuance of default. Company waives forfeiture by claiming a subsequent assessment. *Columbia Ins. Co. v. Buckley*, 6 Ins. L. J. 631. 1877. Pa.

§ 116. A question of notice to member of mutual company of an assessment should be submitted to the jury. *Buckley v. Columbia Ins. Co.* 83 Pa. 298. 1877.

§ 117. Condition of mutual policy provided that if assessment was not paid within 30 days after demand,

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that it should be void. One assessment was made May 10th, 1873, and another January 12th, 1874. Due notice was given and demand made. *Held*, that the non-payment of the first assessment within 30 days did not of itself avoid the policy so as to prevent a second assessment being lawfully made; that the policy did not become absolutely void, but voidable only at option of company; and that forfeiture might be waived. If company cancels the policy, the premium note is not liable to assessment for future losses, but if it does not elect to declare the policy void, the insurance is suspended only during continuance of default in payment. *Columbia Ins. Co. v. Buckley*, 83 Pa. 293. 1877.

§ 118. If assured, after obtaining insurance by a valued policy, in which there is no provision as to contribution, finds his property still uninsured to three fourths its actual value, he may insure in any mutual company until this amount is reached. If, after prior policy is paid in full, the amount which such latter company is to pay does not exceed the proportion which its insurance bears to the whole, and if the assured is not to receive in all more than three-fourths of the value (as limited by the statute), there is no ground of defense. *Bardwell v. Conway Ins. Co.* 122 Mass. 90. 1877.

§ 119. When statute gives a mutual company a lien in the nature of a judgment upon the property insured to the amount of his deposit note, if the insurance covers personal property only it is not within the statute. The fact that one-fifth of the whole risk covered by the policy is on personal property does not prevent the filing of a lien against the real estate. Such lien may be filed after the expiration of the policy. *People's Fire Ins. Co. v. Hartshorne*, 84 Pa. 453. 1877.

§ 120. Counsel employed by policy holders of an insolvent mutual company to represent their interests, has no claim upon surplus fund in receiver's hands for his compensation. *Commonwealth v. Mechanics' Ins. Co.* 122 Mass. 421. 1877.

§ 121. A premium note constituting part of the assets of an insolvent company cannot be surrendered and cancelled in consideration of a promise by the maker to claim nothing of company for its use. Maine Ins. Co. v. Pickering, 66 Me. 130. 1877.

§ 122. Premium note appearing to have been given for value cannot be presumed that it was given in Michigan in violation of statute of the State. American Ins. Co. v. Cutler, 36 Mich. 261. 1877.

§ 123. When charter of a mutual company provides that upon default in payment of an installment due upon a premium note, the risk shall be suspended during the continuance of the default, but that it should revive upon the payment of the note, the company may recover the full amount of the note, and upon the payment by the assured, whether voluntary or otherwise, he acquires a paid-up policy for the remainder of the original period of insurance. American Ins. Co. v. Klink, 65 Mo. 78. 1877.

§ 124. Notice to agent of mutual company through whom the insurance was obtained, that the assured does not wish longer to be insured in the company, cannot destroy the insurance relation. Assured cannot thus relieve himself from his obligation, nor is notice of his desire to such an agent notice to the company. Buckley v. Columbia Ins. Co. 83 Pa. 298. 1877.

§ 125. The lien of a judgment entered in a suit brought by mutual company against a member for an assessment, extends only to the property insured. Haf-penny v. People's Fire Ins. Co. 85 Pa. 48. 1877.

§ 126. Sect. 29, L. 1871, p. 225 (Kansas), does not authorize a company to exchange its policy for a mortgage of the assured for the purpose of an offset. Kans. Ins. Co. v. Craft, 18 Kans. 283. 1877.

§ 127. There can be no liability on the part of a mutual company to the assured for the loss of his property unless he at the same time had payed, or assumed to pay, his proportionate share of the expenses and the losses

sustained by other members. There is no contract of insurance until the company could sustain an action against him on an assessment. Schaffer v. Mutual Ins. Co. 89 Pa. 296. 1877.

§ 128. It is requisite that the amount be correctly stated in a notice of assessment. If incorrect the notice is insufficient and non-payment is no defense to an action upon the policy. Frey v. Mutual Ins. Co. 43 Up. Ca. Q. B. 102. 1878.

§ 129. A mutual company which has given a receipt to the assured, acknowledging "that the plaintiff has given a deposit note and made a cash payment thereon of a certain amount, is estopped to take advantage of a condition providing that in case a note for the first payment should remain unpaid 30 days after it was due the policy should be void. Masse v. Hochelaga Mut. Ins. Co. 22 L. C. Jurist, 124. 1878.

§ 130. Under the statutes of Indiana a premium note of a married woman is void. American Ins. Co. v. Avery, 60 Ind. 566. 1878.

§ 131. A policy does not become *void* upon failure of assured to pay an installment of premium note, but is *voidable* only at option of the company. Assured remains liable upon his note. American Ins. Co. v. Henley, 60 Ind. 516. 1878.

§ 132. Assured is not relieved from forfeiture by his not receiving notice of an assessment duly mailed, owing to his absence from the country. Greeley v. Iowa State Ins. Co. 50 Iowa, 86. 1878.

§ 133. By insolvency of company and a transfer of its assets to a receiver a stock note can be enforced only to extent of the deficit, and that the declaration should show. Lamar Ins. Co. v. Moore, 7 Ins. L. J. 747. Ill. 1878.

§ 134. Charter provided that every member who should sustain a loss should immediately notify the president, who should forthwith call a meeting of the directors;

that they should appoint a committee to ascertain amount of the loss, and in case of inability of the parties to agree, claimant could appeal to the county judge who should appoint three persons as a committee of reference, who should make their award in writing, which award should be final. *Held*, that it was not necessary to aver appointment and decision of an adjusting committee to sustain an action. *Hughes v. Vinland Ins. Co.* 7 Ins. L. J. 331. 1878. Wis.

§ 135. Directors of mutual company have no authority to make assessments in anticipation of losses. Simple excess arising from error of judgment where they act honestly and prudently does not vitiate an assessment. If an assessment is invalid the policy is not forfeited or suspended by neglect or refusal to pay it. *Rosenberger v. Washington Fire Ins. Co.* 87 Pa. 207. 1878.

§ 136. Members of mutual company giving premium notes are liable to assessment to pay losses which had accrued to those who had policies on the cash premium plan, and that such an assessment is valid and proper, although made by resolution of the board of directors of the company held more than a month after the general assignment made by the company for the benefit of creditors. *Schimpf v. Lehigh Valley Mutual Ins. Co.* 86 Pa. 373. 1878.

§ 137. In consideration of \$150 in cash and of a premium note providing for the payment of the balance of the premium in four annual installments assured received a policy which, among other things, provided that in case the assured should fail to pay the installments mentioned in the note within the 30 days after the same severally became due, then the policy should be void during the continuance of such default, that upon payment of the amount due it should revive and be again in full force. Assured having failed to pay installment due on the note within thirty days specified, action being brought upon it by the company, *Held*, that the policy could not be regarded as an absolute insurance for five years, but that it was an

absolute insurance but for one year, with the right of the insured to have it kept in force from year to year by the payment of the annual installment, and that the company not being liable under the policy by the terms of the contract it could not collect the premium at its option while avoiding all risk. *Yost v. American Ins. Co.* 39 Mich. 531. 1878. Also see same company v. Stoy, 41 Mich. 385. 1879.

§ 138. If company intentionally, by language or conduct, leads its policy holders to believe that they need not pay their premium notes promptly, and that no advantage will be taken of that fact, it is equivalent to an express agreement to that effect, and is a waiver of forfeiture. *McCraw v. Old North State Ins. Co.* 78 N. C. 149. 1878.

§ 139. Member of a mutual company cannot pay an assessment by an individual trade, exchange or barter with an agent. The mere fact that policy is procured by an agent creates no legal presumption that he is authorized to receive assessments subsequently made. *Ins. Co. v. Cochran*, 88 Pa. 230. 1878.

§ 140. Although condition declares that policy shall be void on a failure to pay an assessment within a specified time, the policy does not thereby become *ipso facto* void. The company may waive the right of avoidance and then the contract relation is not wholly dissolved, but the protection of the policy is suspended until the default of non-payment is removed. No recovery can, therefore, be had for the loss sustained during the continuance of such default. By levying a subsequent assessment the company does not waive its right to demand payment of one made a year before; nor does it thereby remove the disabling consequences flowing from the neglect to pay that assessment. *Ins. Co. v. Cochran*, 88 Pa. 230. 1878.

§ 141. Liability upon premium note to render assured liable to assessment and of the company for a loss must concur. *Mutual Assurance Society v. Holt*, 29 Grat. 612. 1878.

§ 142. The issue of cash premium policies is not inconsistent with the functions of a mutual company also doing business on the note plan, and the fact that it has issued policies for cash premiums without issuing a certain amount of stock, as it was authorized by its charter to do, does not authorize its dissolution by the court and appointment of a receiver. Commonwealth v. Merchants' and Mechanics' Ins. Cos. 2 Pearson, 428. 1878.

§ 143. Member of mutual company by surrender of his policy accepted by the company operates as a release of the latter. The former has nothing more to do, and he is as effectually released from all future obligations to the company as though his name had never been on its books. In such case the company cannot act against him set up what it had neglected to do that which it had agreed to do in the erasure of his name from the books. The company is not liable upon the policy from the time of its surrender. Farmers' Mutual Ins. Co. v. Wenger, 90 Pa. 220. 1879.

§ 144. A mortgagee to whom insurance has been assigned as security is entitled to the deposit premium on a sale being made of the mortgaged premises, which puts an end to his insurable interest and to that of the mortgagor, and same under the conditions of the policy being due to the assured. Rafsynder's App. 88 Pa. 436. 1879.

§ 145. A conveyance and sale of the property without the notice to and consent of mutual company is such an alienation of the property as avoids the insurance. Moulthrop v. Ins. Co. 53 Vt. 123. 1879.

§ 146. The liability of members of mutual company attaches only to losses which occur after they become members. People's Fire Ins. Co. v. Hartshorne, 90 Pa. 465. 1879.

§ 147. Secretary's certificate as to assessments is *prima facie* evidence of their correctness, but it may be rebutted by showing either fraud and illegality or gross mistake in making the assessments. People's Fire Ins. Co. v. Hartshorne, 90 Pa. 465. 1879.

§ 148. Assured is not relieved from his liability to pay premium note when due or from the effect of non-payment by the happening of a loss just before it becomes due, upon the assumption that company would deduct the amount in settlement of the loss. *Ballagh v. Royal Mutual Ins. Co.* 44 Up. Can. Q. B. 70. 1879.

§ 149. In February, 1875, property insured in mutual company was destroyed by fire. At that time there were two unpaid assessments of which assured had been notified. One of the by-laws provided that where the assessments were thus unpaid assured should forfeit all claim against the company for any loss sustained during delinquency. Immediately after the fire assured paid the assessment to the local agent of the company who received the amount with knowledge of the loss, but forwarded the money to the company without mentioning the fire of which the officers at that time had received no notice from any other quarter. March 16th, 1875, the board of directors adopted a resolution instructing the proper officers to draw a draft in payment of the loss when it should be adjusted. On the second of April following the board passed another resolution that they did not consider the company liable and refused to make any adjustment of the loss. *Held*, that by receiving payment of the assessments company had waived any objection to the delay in paying them and that the company was bound by its reception of the assessments and recognition of the loss. *Farmers' Mutual Fire Ins. Co. v. Bowen*, 40 Mich. 147. 1879.

§ 150. Policy was issued in consideration of six dollars cash and an installment note amounting to twenty-four dollars, payable absolutely at specified times. Charter authorized company to do business wholly or in part upon cash or mutual principle. *Held*, that assured was liable on the note without evidence of losses and an assessment. *Davenport Fire Ins. Co. v. Moore*, 50 Iowa, 619. 1879.

§ 151. Application, policy, and premium note given by the assured must be resorted to and treated as but one instrument for the purpose of ascertaining and determin-

ing the rights of the parties to a mutual policy. American Ins. Co. v. Stoy, 41 Mich. 385. 1879.

§ 152. A foreign insurance company, coming into Michigan under an authority to do business therein for one year, and issuing policies and accepting installment notes for the premiums, must, in order to collect the installments as they become due, show a continued and existing authority as a condition of its right to recover. American Ins. Co. v. Stoy, 41 Mich. 385. 1879.

§ 153. A mutual company waives condition providing that insurance does not take effect until delivery of note, by delivery of the policy to assured before receiving the note. Behler v. German Mut. Ins. Co. 68 Ind. 347. 1879.

§ 154. Agent authorized to take applications has no authority to extend time for payment of premium note. Critchett v. American Ins. Co. 53 Iowa, 404. 1880.

§ 155. Condition providing that in case of loss, if any assessment should be unpaid and past due at the time, the policy should be void and of no effect, is valid and will be enforced, such assessment having been properly and legally made. Southern Mutual Ins. Co. v. Taylor, 33 Grat. 743. 1880.

§ 156. Assured who becomes a member upon the organization of a mutual company, filing his application and premium note, is entitled to a policy and insurance without reference to the fact whether the directors have formally approved of the application as required by a by-law adopted on the day of the organization. Vanslyke v. Trempealeau County Mut. Fire Ins. Co. 48 Wis. 683. 1880.

§ 157. An agreement to cancel the insurance and surrender premium note, operates to relieve members from subsequent assessment. This result is not affected by failure of company or its directors to return note as promised. Acker v. Hite, 10 Ins. L. J. 20. 1880. Pa.

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§ 158. A premium note made and delivered in Indiana to a company which has not complied with the statute governing its authority to do business in the State is not thereby rendered absolutely void, but the remedy is suspended until statute is complied with. *American Ins. Co. v. Wellman*, 9 Ins. L. J. 422. 1880. Ind.

§ 159. Assessments due and payable by members of mutual company are liable in garnishee proceedings instituted at instance of policy holder insured on *cash* plan, and who has obtained a judgment against the company for his loss. *Hays v. Lycoming Fire Ins. Co.* 10 Ins. L. J. 507. 1881. Pa.

See Foreign Company, § 49, 55.

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## NEGLIGENCE.

§ 1. Negligence, although it may have caused the fire, will not avoid the policy. *Mickey v. Burlington Ins. Co.* 35 Iowa, 174. 1872. *s. p. Jameson v. Royal Ins. Co.* Irish Rep. 7 C. L. 126. 1873.

## NOTICE OF LOSS.

§ 1. Notice of the loss to a local agent who by next mail informs the company by a letter addressed to the secretary is sufficient. Farmers' Ins. Co. v. Taylor, 73 Pa. 342. 1873.

§ 2. Notice of loss may be given by a vendee who has purchased the property at a sale under proceedings in the orphans' court, assured being dead, and the loss having occurred between the sale and the confirmation. Farmers' Mutual Ins. Co. v. Graybill, 74 Pa. 17. 1873.

§ 3. Notice of loss to a local agent of company is sufficient. Kendall v. Holland Purchase Ins. Co. 2 T. & C. (N. Y. Sup.) 275. 1873. Aff'd, 58 N. Y. 682.

§ 4. A notice given six days after injury happening in a city where policy was issued and where company has a resident agent, is not "immediate," no excuse being shown for delay. Railway Ins. Co. v. Burwell, 44 Ind. 460. 1873.

§ 5. Condition requiring notice of loss forthwith means due diligence under all circumstances, and an 18 days' notice held not sufficient. Edwards v. Ins. Co. 75 Pa. 378. 1874.

§ 6. Waiver of proofs is a waiver of immediate notice of the fire. Hibernia Ins. Co. v. O'Connor, 29 Mich. 241. 1874.

§ 7. When policy requires notice of a loss "forthwith," if there is any evidence justifying or excusing a delay of twenty-three days, the question should be submitted to the jury. Lycoming Ins. Co. v. Bedford, 5 Ins. L. J. 529. 1876. Pa.

§ 8. A verbal notice of loss is sufficient, no other being stipulated for. If not given in accordance with the contract the informality will be waived by the failure to

object to its form and making objection to payment on other grounds. *State Ins. Co. v. Maackens*, 9 Vroom, N. J. L. R. 564. 1876.

§ 9. The facts that when notice of a loss is given to secretary of a company, he claims that the company has no risk upon the property, without taking the ground that notice is too late, and believing that policy has been canceled, do not show waiver of notice. *Bennett v. Lycoming Mut. Ins. Co.* 67 N. Y. 274. 1876.

§ 10. In case of fire, policy required notice to be given "forthwith." *Held*, that the word does not mean immediately or instantaneously after the fire. It means within a reasonable time, or with reasonable diligence after the fire. What is reasonable time depends upon all the circumstances of the case. When the facts are undisputed it is a question for the court. *Bennett v. Lycoming Mut. Ins. Co.* 67 N. Y. 274. 1876.

§ 11. Property was destroyed by great fire in Chicago, October 9, 1871. Notice was given and received without objection on November 13th thereafter. Policy required "immediate notice." *Held*, notice to be given in sufficient time in consideration of the special circumstances of the case. *Knickerbocker Ins. Co. v. McGinnis*, 87 Ill. 70. 1877.

§ 12. The condition as to notice is a precedent one, non-performance of which precludes recovery. *Sembler* that accident or misfortune happening to party bound to perform such a condition, unless caused by adverse party, will not excuse performance. *Sherwood v. Agricultural Ins. Co.* 10 Hun, 593. 1877. *Aff'd*, 73 N. Y. 447, this point not considered.

§ 13. A substantial compliance with the condition in regard to notice of the loss accepted and acted upon by the company is sufficient. *Willis v. Germania Ins. Co.* 79 N. C. 285. 1878.

§ 14. Condition in regard to notice of loss is precedent to right of action. *Ins. Co. v. McGookey*, 33 Ohio, 555. 1878.

§ 15. When an insurance company sends an agent to adjust a loss, it is estopped to subsequently deny that it had proper notice of loss, and it is, in the absence of fraud, concluded by the adjustment made by such agent. *Home Ins. Co. v. Myer*, 93 Ill. 271. 1879.

§ 16. Notice of loss was signed by mother of owner, and advised company of fire and number of its policy. No objection was made, nor claim to return it. *Held*, sufficient notice. It advised defendant of the loss, which was all that was required. *O'Brien v. Phoenix Ins. Co.* 76 N.Y. 459. 1879.

§ 17. Policy required notice of loss forthwith, and that proofs should be furnished in fifteen days. Fire occurred January 17th. Next day assured notified local agent, who sent a dispatch to the general agent, and on the 23d assured sent such agent a formal written notice, which was received January 27th. Proofs were prepared January 22d, and received by the agent of the company "early in February," the agent not recollecting the date. *Held*, notice sufficient and evidence sufficient to sustain a finding that proofs were furnished within the required time. *Peppit v. N. B. & M. Ins. Co.* 1 Russel & G., N.S. 219. 1879.

§ 18. Provision requiring immediate notice requires due diligence under all circumstances. *Wooddy v. Old Dominion Ins. Co.* 31 Grat. 362. 1879.

§ 19. When contract is completed but the policy has not been delivered, although assured is required by its terms to give immediate notice of the loss, a delay of eighteen days *held*, under the circumstances of the case, not to be a violation of the condition. *Wooddy v. Old Dominion Ins. Co.* 31 Grat. 362. 1879.

§ 20. *Semble* that an assignee of a policy after a fire may give sufficient notice of a loss. *Watertown Ins. Co. v. Grover & Baker Sewing Machine Co.* 41 Mich. 131. 1879.

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§ 21. Notice of loss may be properly given by a party to whom loss is made payable to local agent who issued the policy, same coming to the knowledge of at least the general agent or adjuster of the company. Notice is distinct from proofs of loss; the object is that the company may know that a loss has in fact occurred, that it may take such action as is advisable to protect its interests. *Watertown Ins. Co. v. Grover & Baker Sewing Machine Co.* 41 Mich. 131. 1879.

§ 22. The condition requiring immediate notice of a loss must receive a liberal construction, and the question is one to be determined by the jury. The word "immediate" must mean a reasonable time under the circumstances. *Lockwood v. Middlesex Mut. Ins. Co.* 47 Conn. 553. 1880.

See Agent, § 26. Examination, 4. Proofs of Loss, 2, 56, 63. Questions for Court and Jury, 1. Waiver, 19.

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## OTHER INSURANCE.

§ 1. Notice of other insurance to a broker does not bind the company. *McLachlan v. Aetna Ins. Co.* 4 Allen, N. B. 173. 1858.

§ 2. To constitute other insurance, policy must be upon the same interest, and it must be shown that the assured was entitled to recover. *McLachlan v. Aetna Ins. Co.* 4 Allen, N. B. 173. 1858.

§ 3. Assured is bound to give notice of a second policy obtained by him, whether valid or not. *Campbell v. Aetna Ins. Co.* 1 Cochran, N. S. 21. 1859.

§ 4. Clause requiring notice of other insurance is a condition precedent to a right of action. *McBride v. Gore District Mut. Ins. Co.* 30 Up. Can. Q. B. 451. 1870.

§ 5. Verbal notice to agent who issued the policy of the obtaining of subsequent insurance is insufficient to make the company liable, consent not being indorsed on the policy as required. *Hendrickson v. Queen Ins. Co.* 31 Up. Can. Q. B. 547. 1871.

§ 6. Other insurance to render policy void must be effected by the assured, or for his benefit, or with his knowledge and consent. *Kelly v. Liv., Lond. & Globe Ins. Co.* 2 Hannay, 266. 1871.

§ 7. The existence of other insurance does not make a policy absolutely void, but *voidable* only at option of the company. *Hubbard v. Hartford Fire Ins. Co.* 33 Iowa, 325. 1871.

§ 8. A second policy must be valid to be "other insurance" making former void. *Hubbard v. Hartford Fire Ins. Co.* 33 Iowa, 325. 1871.

§ 9. The clause "other insurance permitted without notice," applies to prior as well as to subsequent insurance. *Frederick Co. Mut. Ins. Co. v. Deford*, 38 Md. 404. 1873.

§ 10. Policy contained provision that it should be void if the insured should have or should procure any other insurance without consent. Both parties were aware of the existence of a prior policy at the time of the issue of the former, and it was a part of their understanding that it should be canceled. It was canceled in fact, but not as was claimed by defendant until the day after the delivery of its policy. *Held*, that the first policy did not constitute other insurance; that its cancellation was one of several steps which were to be taken to complete the second insurance, and whether taken a few minutes or a few hours before or after any other steps necessary to being a completed contract was immaterial if all were taken substantially at the same time and before the transaction was considered closed. *Continental Ins. Co. v. Horton*, 28 Mich. 173. 1873.

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§ 11. If company, without objection, accepts notice of other insurance eight months after their policy is issued, and the other policy is obtained, it is a waiver of a condition requiring *immediate* notice. *Farmers' Ins. Co. v. Taylor*, 73 Pa. 342. 1873.

§ 12. Company is estopped from setting up want of written consent to other insurance which was obtained by assured upon its request, its own policy being reduced, and assured having delivered the policy to defendants' agent for purpose of having consent indorsed, which was not done through his neglect. *Cobb v. Ins. Co. of N. A.* 11 Kans. 93. 1873.

§ 13. If company is advised by its agent of the existence or obtaining of additional insurance, if it does not desire to give the necessary consent and remains silent, it is estopped from insisting upon such fact as a defense. *Ins. Co. v. Lyons*, 38 Tex. 253. 1873.

§ 14. Other insurance must be by the same person or cover the same interest to constitute a forfeiture. *Gilchrist v. Gore Mutual Ins. Co.* 34 Up. Can. Q. B. 15. 1873.

§ 15. Policy was originally issued \$5,000 on stock of hides and leather May 2d, 1871. It was so written by mistake of the company's clerk. Error was not discovered until June 3d, when, upon application of assured, company made the following indorsement, "1871, June 3d, after this date this policy covers \$2,500 on stock and \$2,500 on building." *Held*, that testimony of the mistake was admissible, and that the indorsement did not create a new contract of insurance, making it "other insurance" within meaning of provision of another policy containing a provision against subsequent insurance. *Planters' Mut. Ins. Co. v. Deford*, 38 Md. 382. 1873.

§ 16. Assignee's ignorance of other insurance by assured cannot deprive company of benefit of condition in regard to other insurance. *Dickson v. Provincial Ins. Co.* 24 Up. Can. C. P. 157. 1874.

§ 17. Assured held a policy containing a condition that if assured should have any other insurance (whether valid or not) without consent, it should be void. Without surrendering or canceling this policy he procured another from a second company, which also contained a similar condition against other insurance. *Held*, that the first policy remained in force, as the second never had any validity, and the plaintiff could not therefore recover. Whether the words "valid or not" in the first policy are not void for repugnancy, *query?* *Gee v. Ins. Co.* 55 N. H. 65. 1874. *s. p. Allison v. Phoenix Ins. Co.* 3 Dill. 480. 1873. *Sutherland v. Old Dominion Ins. Co.* 31 Grat. 176. 1878. *Contra, Kennedy v. Ins. Co.* 6 Ins. L. J. 359. 1877. Tenn.

§ 18. Upon an issue as to the existence of other insurance and invalidity of policy on account of it, a letter containing notice of the existence of such other insurance at the time of the delivery of the policy cannot be read in evidence upon proof of its delivery to a person in the office of defendant's agent, but who is not called as a witness or shown in any manner to be connected with such agent or the company, both the company and its agent swearing that they never received such letter. *Sun Ins. Co. v. Earle*, 29 Mich. 406. 1874.

§ 19. Condition against obtaining subsequent insurance is valid and will be enforced. *Phoenix Ins. Co. v. Mich. Southern R. R. Co.* 28 Ohio, 69. 1875.

§ 20. A marine policy cannot be claimed to be other insurance when assured could not recover the loss upon it. *Australian Agricultural Company v. Sanders*, L. R. 10 C. P. 668. 1875.

§ 21. When policy contains condition against other insurance it is not avoided by an alleged contract for other insurance shown to be invalid. *Knight v. Eureka Fire Ins. Co.* 26 Ohio, 664. 1875.

§ 22. Policy issued to one of tenants in common, without stating joint ownership, is other insurance with-

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in meaning of clause relating thereto in another policy, covering joint interest. *Pitney v. Glen's Falls Ins. Co.* 65 N. Y. 6. 1875.

§ 23. Other insurance to avoid policy must be upon same interest. *Roos v. Merchants' Mut. Ins. Co.* 27 La. Ann. 409. 1875.

§ 24. At time of fire there were two policies covering the same property, obtained at different times, both containing condition against other insurance without assent of the company, and neither containing such consent. *Held*, in a suit upon the first policy, that the second being invalid by reason of existence of first not consented to, by legal intendment there was no second insurance and, therefore, no avoidance of the first policy. Nor is the fact that assured receives payment from the second company important or material in this connection; assured is not thereby estopped from asserting that there was no valid insurance. *Thomas v. Builders' Mut. Ins. Co.* 119 Mass. 121. 1875.

§ 25. Existence of other insurance may be proved by parol evidence. *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388. 1875.

§ 26. Statute provided that it should be void in case of other insurance; that upon giving written notice to the company of the obtaining of other insurance that it should be deemed as assented to unless the company should, within two weeks after the receipt of such notice, notify the party in writing of its dissent. On the 5th instant notice was given of other insurance. The fire broke out at 10 P. M. on the evening of the 19th. *Held*, that the company had fourteen days ending on and including the 19th day to dissent, and that the loss having occurred within the time limited for the exercise of the option of the company, plaintiff could not recover. *McCrea v. Waterloo Mut. Ins. Co.* 26 Up. Can. C. P. 431. 1876.

§ 27. Statute provided that whenever any notice of the existence of other insurance was received by the com-

pany, that it should be deemed assented to unless within two weeks after its receipt company should in writing notify the assured of its dissent. *Held*, that notwithstanding the two weeks may not expire until after a loss, notice must be given before it. *Fair v. Niagara District Mut. Ins. Co.* 26 Up. Can. C. P. 398. 1876.

§ 28. To establish defense of other insurance it must be established that the policy covers the same property. *Hazard v. Canada Agricultural Ins. Co.* 39 Up. Can. Q. B. 419. 1876.

§ 29. If other policy covers a part only of the same property insured, it is other insurance. *Billington v. Canadian Mutual Fire Ins. Co.* 39 Up. Can. Q. B. 433. 1876.

§ 30. When policy gives permission for \$3,000 other insurance it must be assumed that consent is not required to be any more definite. In this respect policy furnishes its own rule of construction. *Westchester Fire Ins. Co. v. Earl*, 33 Mich. 143. 1876.

§ 31. Under the statute (Me.), R. S. ch. 49, sec. 19, the existence of other insurance, to be effectual as a defense, must be shown to have materially increased the risk. *Lindley v. Union Ins. Co.* 65 Me. 368. 1876.

§ 32. When statute requires receipt of notice of other insurance, assured must not only prove that he sent such notice but that it was actually received. *Lyons v. Manufacturers' Ins. Co.* 28 Up. Can. C. P. 13. 1877.

§ 33. A policy which has been surrendered to a local agent, with mutual intent that it be surrendered and canceled, and at the same time he is directed to obtain a policy from another company in place of it, which he does, in a suit upon the latter the former cannot be considered as other insurance. *Train v. Holland Purchase Ins. Co.* 68 N. Y. 208. 1879.

§ 34. When company, by mistake or intent, indorses permission for \$6,250 other insurance instead of \$8,000, it

is estopped to insist upon the defense of invalidity of its policy on account of the existence of the excess of the insurance over the amount so written. *Greene v. Equitable Fire Ins. Co.* 11 R. I. 434. 1877.

§ 35. Policy required written consent to be indorsed thereon in case of other insurance, otherwise to be void. In reply to a letter sent by assured to agent of the company who issued the policy, the latter said: "We will, of course, allow other concurrent insurance with the Allemania policy, and will also place you more insurance at same rate that we charged you before, and do it in A 1 company or companies. Trusting to hear from you at your earliest convenience, we remain, &c." *Held*, that the correspondence between the parties could not take the place of the consent required by the terms of the policy, which became absolutely void upon obtaining additional insurance without consent. *Allemania Fire Ins. Co. v. Hurd*, 37 Mich. 11. 1877.

§ 36. The motive or the intention of the party in obtaining additional insurance is immaterial when such fact is relied upon as a defense to defeat an action upon another policy. *Pennsylvania Fire Ins. Co. v. Kittle*, 39 Mich. 51. 1878.

§ 37. The materiality of a representation in regard to the existence of other insurance is proper to be submitted to the jury. *Parsons v. Citizens' Ins. Co.* 43 Up. Can. Q. B. 261. 1878.

§ 38. Other insurance, to render policy void, must be legal insurance, and the true issue in such a case is whether the policy, not on its face but on all the facts legally in evidence, is binding upon the insurer. *Dahlberg v. St. Louis Mut. Ins. Co.* 6 Mo. App. 121. 1878.

§ 39. There is no breach of condition against subsequent insurance by the existence of a second policy which is void by reason of conditions contained therein; such condition contemplates subsequent *valid* insurance, and is not broken by an *attempt* to obtain further insurance

which is void by its terms. *Ins. Co. v. Holt*, 35 Ohio, 189. 1878.

§ 40. Compromise, settlement and payment, on a subsequent void policy, is not a matter of defense to an action on a prior policy. *Ins. Co. v. Holt*, 35 Ohio, 189. 1878.

§ 41. A condition against subsequent insurance is not applicable to an invalid contract for other and additional insurance, and a policy is not voided by an abortive attempt to make other insurance which was never completed or effected. If the second cannot be enforced, it is no breach of the condition. *Sutherland v. Old Dominion Ins. Co.* 31 Grat. 176. 1878.

§ 42. Adjuster, after investigation of a loss, made an offer of compromise \$375, and at same time objected to the existence of other insurance. Offer being declined he went away, and soon after wrote to the assured that he might go on and make out his proofs and the matter would then be taken into consideration. Subsequent correspondence took place respecting the proofs, the adjuster demanding more particularity in what was furnished, and it was not until six months after the offer of settlement was made that he informed the assured, who meantime had been endeavoring to make the proofs satisfactory, that in addition to the objections heretofore made the defendant would insist upon forfeiture because of the ~~had~~ <sup>other</sup> insurance. *Held*, that evidence justified a finding by the jury of a waiver of the defense founded upon the existence of other insurance. *Pennsylvania Fire Ins. Co. v. Kittle*, 39 Mich. 51. 1878.

§ 43. Policy containing usual condition against other insurance and alienation was assigned to M., with consent of the company. M., after a loss, assigned to plaintiff. Afterwards the assured encumbered the property by mortgage, obtained other insurance, and then sold the property subject to the mortgage. *Held*, that policy was voided; that plaintiff could not recover. *Kanady v. Gore District Mut. Fire Ins. Co.* 44 Up. Can. Q. B. 261. 1879.

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§ 44. The validity of a policy claimed to be other insurance cannot be tried in a suit against another company, specially when the former company has admitted its liability and paid the loss. *Gauthier v. Waterloo Ins. Co.* 44 Up. Can. Q. B. 490. 1879.

§ 45. When assured holds a certificate of insurance subject to all the terms and conditions of a policy as usually issued, assured is bound by such terms and conditions, and if the policy contains a clause against other insurance, the fact that agent knew that there was other insurance, without knowing its amount, will not estop company from insisting upon the fact as a defense, and policy will not be reformed on assured's application by making the proper indorsement of consent. *Billington v. Provincial Ins. Co.* 3 Can. Sup. 182. 1879.

§ 46. Assured, being an illiterate man, was told and induced to believe by an insurance agent that his policy with defendant had expired, and upon such representation received from such agent an interim receipt for thirty days for other insurance by such agent in another company. Fire happened within thirty days. The agent then ascertaining that defendant's policy had not expired, withdrew plaintiff's application for the second insurance and received interim receipt from him. *Held*, that condition in defendant's policy in relation to other insurance was nevertheless broken, and that plaintiff could not recover. *Gauthier v. Waterloo Ins. Co.* 44 Up. Can. Q. B. 490. 1879.

§ 47. Subsequent insurance, effected by a mortgagee in another company in the assured's name, is not other insurance when it is effected without any authority from the assured and without his knowledge, subsequent adoption or ratification. *Sauvey v. Isolated Ins. Co.* 44 Up. Can. Q. B. 523. 1879.

§ 48. A policy of company which has not complied with statute governing its admission to the State and authority to transact business, is "other insurance," and cannot be claimed to be void. *Behler v. German Mut. Ins. Co.* 68 Ind. 347. 1879.

§ 49. Policy was issued by defendant to one Merrill, loss payable to plaintiff as mortgagee, and contained usual clause against other insurance. It expired March 6, 1877, and was renewed. On March 2, 1877, plaintiff procured of another company a policy insuring the same property in name of Merrill, loss payable to him as mortgagee. Merrill had no knowledge of this second policy until after the fire. The mortgage contained clause authorizing plaintiff to procure insurance in case of owner's default to keep property insured. The proofs of loss were executed by Merrill at plaintiff's request for the second company. *Held*, that plaintiff was not Merrill's agent in procuring the second policy; that the clause in mortgage was not operative until some default was shown on Merrill's part, which could only be after notice or demand; that there was no ratification by Merrill in the execution of the proofs; that the second policy was not other insurance within meaning of policy procured by Merrill. *Titus v. Glen's Falls Ins. Co.* 81 N. Y. 410. 1880.

§ 50. Agent of company and the assured acting under a mutual misapprehension as to existence of prior insurance, both in good faith assuming that property was not insured, and agent wrote a policy which remained in his office until after the fire, when it was marked "canceled." In a suit upon *prior* policy, *Held*, that the second policy was not other insurance. *Wilson v. Queen Ins. Co.* 10 Ins. L. J. 302. 1880. U. S. Circuit, Pa.

§ 51. When company sends its policy to its soliciting agent for purpose of delivery to the assured, and it is delivered with the knowledge of such agent of the existence of other insurance, condition in policy in regard to other insurance is waived or the company is estopped from insisting upon it as a defense. *Brandup v. St. Paul Ins. Co.* 10 Ins. L. J. 228. 1880. Minn.

§ 52. Two policies were obtained at different times and both contained condition against other insurance. In an action brought upon the one first obtained, it was claimed that the second was absolutely void, and left the first in full force. *Held*, that the second insurance was

not void, but voidable only at option of the company; and that if it was void, *ab initio*, that fact would not relieve the assured from forfeiture from violation of stipulation in first policy against additional insurance. *Suggs v. Liv., L. and G. Ins. Co.* 9 Ins. L. J. 657. 1880. Ky.

§ 53. A policy procured by assured which is invalid by reason of breach of some condition contained therein is not other insurance. Nor does the fact that company compromised with and paid the assured avail the defendant in a suit upon the prior policy wherein such defense is set up. *Firemen's Ins. Co. v. Holt*, 9 Ins. L. J. 212. 1880. Ohio.

§ 54. When policy provides that notice of other insurance shall be given in writing, and shall be consented to in writing by the secretary, and that no other notice shall be binding or have any force against the company, knowledge of an agent cannot be considered as an equivalent of what is required. *Commonwealth Fire Ins. Co. v. Huntzinger*, 10 Ins. L. J. 618. 1881. Pa.

§ 55. An insurance upon another interest is not other insurance; nor does an invalid policy avoid a prior policy of the same assured on the same interest. *Wheeler v. Watertown Fire Ins. Co.* 10 Ins. L. J. 354. 1881. Mass.

See Agent, § 50, 98, 99. Application, 10. Concealment, 4. Contribution, 15. Estoppel, 1, 3, 8, 18, 25, 30, 31, 33, 37. Evidence, 58, 73. Mortgagor and Mortgagee, 26, 30, 33, 41. Mutual Company, 1, 97, 109. Parol Contract, 8, 31, 41. Pleading and Practice, 27. Proofs of Loss, 13. Reformation, 1. Renewal, 5. Waiver, 2, 14, 18, 22, 39, 47, 51. Warranty and Representation, 14.

## OVERVALUATION.

§ 1. When assured states a certain amount to be "the present estimated value," it cannot be construed that he thereby warrants it to be absolutely true; but such representation is so far material that it should be left to a jury to determine whether the amount stated by the plaintiff was a fair estimate honestly made with a reasonable belief in its truth. *Riach v. Niagara District Mutual Ins. Co.* 21 *Up. Can. C. P.* 464. 1871. *Chaplin v. Provincial Ins. Co.* 23 *Up. Can. C. P.* 278. 1873.

§ 2. In an open policy an overvaluation in obtaining it is immaterial. *Aurora Fire Ins. Co. v. Johnson*, 46 *Ind.* 315. 1874.

§ 3. If assured by false representations obtains insurance to amount of two thousand dollars on a valuation of three thousand dollars when actual value does not exceed fifteen hundred, this, of itself, vitiates the policy and renders it void absolutely. *Lycoming Fire Ins. Co. v. Rubin*, 79 *Ill.* 402. 1875.

§ 4. Policy provided that any untrue or inaccurate statement in an application or plan whether intentional or not should render it void. By another condition it was provided that in case of loss, if property should be found by arbitration or otherwise to have been overvalued in survey and description on which this policy is founded, that the company should be liable only for such proportion of actual value as the amount insured should bear to the value given in the application. *Held*, that the first condition did not apply to any statements as to value in the application, which were governed only by the last condition. *Williamson v. Commercial Union Ins. Co.* 26 *Up. Can. C. P.* 591. 1876.

§ 5. Unless an overvaluation is so clearly established as to show that it is either the result of a mistake or a willful intention to deceive, rather than the estimate of a

too partial and sanguine mind, it will not vitiate the policy. *Germania Fire Ins. Co. v. Casteel*, 7 Ins. L. J. 253. 1877. Ill.

§ 6. An excessive valuation does not avoid the policy unless shown to have been excessive to the knowledge of the applicant. *Parsons v. Citizens' Ins. Co.* 43 Up. Can. Q. B. 261. 1878.

§ 7. When policy provides that an overvaluation shall void it, a substantial overvaluation, such as would not ordinarily arise from a difference of opinion whether honestly or fraudulently made by the assured, voids the policy. This is by reason of the well settled principle of all contracts that what the parties themselves declare material and sufficient to render the contract void must be held material and of such effect as the parties intended. *Bouelle v. Worcester Fire Ins. Co.* 51 Vt. 4. 1878.

§ 8. Upon a question of good faith on the part of the assured at the time of the issue of the policy in reference to value, offers of purchase made and refused afterwards are inadmissible. *Wood v. Firemen's Ins. Co.* 126 Mass. 316. 1879.

§ 9. Under the Maine statute in case of an overvaluation the inquiry is not as to the effect in inducing company to issue a policy, but whether it contributed to the loss or materially increased the risk. Fraud is not an essential element of such defense. *Thayer v. Providence Ins. Co.* 70 Me. 531. 1880.

§ 10. An overvaluation in obtaining a policy does not avoid it unless willful, false, and fraudulent. If grossly overvalued that fact may be properly considered by jury as evidence, but not conclusive, of a fraudulent overvaluation. *Citizens' Fire Ins. Co. v. Short*, 62 Ind. 316. 1878. *s. p. Canada Land Co. v. Canada Agricultural Ins. Co.* 17 Grant Ch. 418. 1870. *Field v. Ins. Co. N. A.* 6 Biss. 121. 1874. *Pacand v. Queen Ins. Co.* 21 L. C. Jurist, 111. 1876. *Planters' Ins. Co. v. Myers*, 55 Miss. 479. 1877. *Continental Ins. Co. v. Ware*, 9 Ins. L. J. 519. 1880. Ky.

Farmers' Ins. Co. v. Meckes, 10 Ins. L. J. 707. 1880. Pa.  
Miller v. Alliance Ins. Co. 12 Rep. 4. 1881. U. S. Circuit,  
N. Y.

See Application, § 8. Estoppel, 37. Fraud and False Swearing, 4. War-  
ranty and Representation, 15, 36, 44, 52, 56.

### PAROL CONTRACT.

§ 1. A memorandum sufficient to make a parol contract of insurance will be presumed to be made under the terms and conditions of the policy usually issued in the office where such memorandum is made. State Fire Ins. Co. v. Porter, 3 Grant Cas. 123. 1860.

§ 2. Parol contract to insure sufficient to sustain ac-  
tion. Hartford Fire Ins. Co. v. Wilcox, 57 Ill. 180.  
1870.

§ 3. When charter and by-laws provides in sub-  
stance that all applications and contracts of insurance  
shall be in writing and that the latter shall be signed by  
the president, company cannot be bound by a parol con-  
tract. Henning v. U. S. Ins. Co. 47 Mo. 425. 1871.

§ 4. A parol contract of insurance by agent is con-  
sidered as a contract for insurance upon the usual terms  
and conditions as expressed in a policy agent is empow-  
ered and accustomed to insure. Hubbard v. Hartford  
Fire Ins. Co. 33 Iowa, 325. 1871.

§ 5. An agent, clothed with full authority to make  
all necessary surveys, to determine the risk, its duration,  
and the rate of premium, without any reference to consul-  
tation with company or its officers, to negotiate and con-  
clude all the terms of the contract, and to consummate it  
by filling up and countersigning a policy which has been  
delivered to him in blank signed by the president and

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secretary, may bind the company by a parol agreement. *Ellis v. Albany City Ins. Co.* 50 N. Y. 402. 1872. And see *Taylor v. Germania Ins. Co.* 2 Dill. 282. 1872.

§ 6. Company issued certificate of insurance which contained reference as follows: "under and subject to the conditions of policy number 780." Action was brought upon the certificate. *Held*, that a verdict upon proof of the certificate alone could not be sustained; that the policy was part of the contract and should have been proved. *Underwriters' Agency v. Sutherlin*, 46 Ga. 652. 1872.

§ 7. On the 9th of August, 1871, application was made for insurance to the amount of \$6,000, on a stock of dry goods contained in a certain building. On the following day assured gave a written notice to the agent that they had added two flats over the store adjoining and that part of their stock was then in these new flats. The agent, a few days after, inspected the premises and told the assured that the rate would have to be increased on account of the connection being made with the adjoining building by large doorways. On the 29th of August agent wrote to the company informing them that assured had cut an opening into the adjoining building, also that he inspected the premises and that he had notified the assured that the rate would have to be increased to one per cent. Subsequently assured paid the agent the increased amount of premium and on the 23d of September the agent gave them an interim receipt dated 4th of August for amount of premium for insuring \$6,000 on stock for one year from that date; if the insurance was approved of a policy would be delivered, or if declined the amount received would be refunded less the premium for the time so insured. Assured afterwards received a policy from the agent which, while it noted the opening between the two houses, did not in terms cover the stock of the assured in the two flats adjoining. The policy bore date of 9th August, 1871. Fire occurred 11th March, 1872, some of the goods damaged and destroyed being partly in the store first occupied by the assured, and partly in the two added flats. Defendant having refused to pay for the loss sustained on goods

in the latter portion, action was brought by the plaintiffs for recovery. *Held*, that there was a sufficient contract of insurance covering the goods in the added flats, and that assured was not estopped or prevented from having a reformation of his policy from the fact of his acceptance of it, supposing that it really carried out the agreement. *Liv., Lond. & Globe Ins. Co. v. Wyld*, 1 Can. Sup. 604. 1877. Affirming 33 Up. Can. Q. B. 284. 1873.

§ 8. When assured holds a certificate or temporary written agreement for insurance, it is not necessary that an indorsement of other insurance should be made thereon when suit is brought upon such an instrument. *Dayton Ins. Co. v. Kelly*, 24 Ohio, 345. 1873.

§ 9. The fact that company's charter provides that all policies or contracts of insurance shall be subscribed by the president, or such other officers as may be designated by the directors, and attested by the secretary does not prevent the making of a sufficient parol contract of insurance by an agent binding the company. *Dayton Ins. Co. v. Kelly*, 24 Ohio, 345. 1873.

§ 10. To sustain a suit in equity to compel the issue of a policy, there must be a preponderance of evidence that the contract was made, and that premium was paid or credit given. *Dinning v. Phoenix Ins. Co.* 68 Ill. 414. 1873.

§ 11. In an action upon a parol contract of insurance wherein as a part of the relief prayed for the court is asked to decree that the company issue and deliver its policy in accordance with such contract, there can be no recovery without the plaintiff showing a compliance with the conditions contained in said policy precedent to the loss being due and payable. *McCann v. Aetna Ins. Co.* 3 Neb. 198. 1874.

§ 12. An action to compel the issue and delivery of a policy upon a parol contract of insurance cannot be sustained unless there is conclusive proof that such contract was actually made. If there is any doubt suit should be dismissed. *McCann v. Aetna Ins. Co.* 3 Neb. 198. 1874.

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§ 13. Although in Georgia the code requires contracts of insurance and alterations to be expressed in writing, equity will sustain a contract by parol on the ground of estoppel. A verbal consent of company's agent to removal does not present a proper case for such relief. *Simonton v. Liv., L. and G. Ins. Co.* 51 Ga. 76. 1874. Must be in writing and the time expressed. *Clark v. Brand,* 62 Ga. 23. 1878.

§ 14. When company's charter expressly requires contracts of insurance to be in writing there cannot be a binding parol contract. *Haslett v. Allegheny Ins. Co.* 4 Ins. L. J. 372. 1874. Pa.

§ 15. A decree for the issue and delivery of a policy in accordance with a parol contract and a recovery for the amount of the loss may be had in one action. *Gerrish v. Ins. Co.* 55 N. H. 355. 1875.

§ 16. A parol contract of insurance indefinite as to time and indefinite as to rate of premium is incapable of enforcement. *Strohn v. Hartford Fire Ins. Co.* 37 Wis. 626. 1875.

§ 17. Where assured applied for insurance to an agent and received a receipt for the premium, containing a brief description of the property and risk, *Held*, that assured's rights were governed by such a policy as he was entitled to have upon his application, and that hence the limitation clause in such a policy was operative, notwithstanding his ignorance of its existence. *De Grove v. Metropolitan Ins. Co.* 61 N. Y. 594. 1875.

§ 18. While an oral contract of insurance is binding and will be enforced (*Strohn v. Hartford Ins. Co.* 33 Wis. 648. 1873. *Hartford Ins. Co. v. Farrish*, 73 Ill. 166. 1874), every essential element must be established by clear and satisfactory evidence. *Franklin Ins. Co. v. Taylor*, 5 Ins. L. J. 671. 1876. *Miss. Weeks v. Lycoming Ins. Co.* 7 Ins. L. J. 552. 1878. U. S. Circuit, Vt.

§ 19. Series of negotiations resulting in nothing more than an understanding as to terms upon which party might insure in case he should deem it proper to do so,

and assurance by him to the agent that he would accept his terms, without taking any steps to carry out this assurance until after loss has been sustained, does not constitute a sufficient parol contract of insurance. In such cases the agreement should be established by a clear preponderance of evidence. In controversies arising out of agreements to *renew* less strictness of proof may be required. *Continental Ins. Co. v. Jenkins*, 5 Ins. L. J. 514. 1876. Ky.

§ 20. An interim receipt provided that the assured should be considered insured until otherwise notified either by notice mailed from the head office or by the agent, within one month from its date, when, if declined, receipt should be void and should be surrendered. *Held*, that if the assured was not notified within the period prescribed of the decision of the company, that there was an insurance for one year binding upon the company upon the same terms and conditions as were contained in the policies as ordinarily used. *Hawke v. Niagara District Ins. Co.* 23 Grant Ch. 139. 1876.

§ 21. By-law provided that certain circumstances would vitiate the policy unless notice should be given and consent indorsed on the policy. *Held*, that policy meant insurance or some equivalent, and that plaintiff was not exonerated from giving notice because there was no policy upon which to indorse consent, he holding an interim receipt upon which it might have been indorsed. *Hawke v. Niagara District Ins. Co.* 23 Grant Ch. 139. 1876.

§ 22. A person dealing with a New York company in Massachusetts, cannot be presumed to know terms of its charter, which cannot limit an agent's authority to make a binding parol contract of insurance. *Relief Fire Ins. Co. v. Shaw*, 6 Ins. L. J. 713. 1876. U. S. Supreme.

§ 23. Terms of insurance were agreed upon between the owner and agent of company authorized to receive applications and issue certificates during correspondence

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only. No certificate was given; assured told the agent that when he had policy ready to bring it to him and he would settle. Subsequently owner was advised by agent that policy was ready for delivery on payment of the premium. Assured made several calls upon the agent, with money, for purpose of receiving the policy and paying the premium, but each time not finding the agent in. Finally, a short time before the fire, policy was canceled by the company for non-payment of the premium. *Held*, that there was no sufficient oral contract for insurance; that the insurance contemplated by the parties was by a policy to be issued upon payment of the premium. *Myers v. Liverpool, Lond. and G. Ins. Co.* 121 Mass. 338. 1876.

§ 24. It is sufficient to constitute a parol contract of insurance if one party proposes to be insured and the other party agrees to insure, and the subject, the period, the amount, and the rate of insurance is ascertained or understood, and the premium paid if demanded. *Eames v. Home Ins. Co.* 4 Otto, 629. 1876.

§ 25. In case of parol contract of insurance, it will be presumed that parties contemplate such form of policy, containing such conditions and limitations as are usual in such cases, or have been used before between the parties. *Eames v. Home Ins. Co.* 4 Otto, 629. 1876.

§ 26. Equity will compel the issue and delivery of a policy after a loss where there has been a valid agreement for one before the loss, and will enforce payment of it as if made in advance. *Franklin F. Ins. Co. v. Taylor*, 52 Miss. 441. 1876.

§ 27. If a valid contract, by parol, in the form set up, is proved, a plaintiff can recover at law the same damages as if he were suing on a policy issued in the form in which it was agreed to be issued. *Humphry v. Hartford Fire Ins. Co.* 15 Blatch. 35, 511. 1878.

§ 28. A clerk whose duty it is to receive applications, fill out policies and renewals, mark risks for surveyors, and "generally attend to whatever is transacted behind

the counter," binds company by a parol contract of insurance. Cooke v. Aetna Ins. Co. 7 Daly, 555. 1878.

§ 29. A parol contract of insurance may be binding although premium is left uncertain and undetermined. Cooke v. Aetna Ins. Co. 7 Daly, 555. 1878.

§ 30. An interim receipt for insurance is subject to the statutory conditions imposed by 39 Vic. ch. 24. Parsons v. Queen Ins. Co. 43 Up. Can. Q. B. 271. 1878.

§ 31. It is not essential that consent to the existence of other insurance should be indorsed upon an interim receipt for insurance. Parsons v. Queen Ins. Co. 43 Up. Can. Q. B. 271. 1878.

§ 32. A binding receipt for a specified period, pending submission of application, cannot be extended by implication. In absence of notice by company, it is not liable for a loss occurring after limited time. Barr v. Ins. Co. of N. A. 61 Ind. 488. 1878.

§ 33. An agent who is authorized only to receive and forward applications, deliver policies and collect premiums, cannot bind company by a parol contract of insurance. Assured having notice that the agent could not issue policy, that his application must be forwarded for approval, is bound to inquire as to extent of agent's authority, and has no right to rely upon representation of the latter that it is "all right, &c." Fleming v. Hartford Fire Ins. Co. 7 Ins. L. J. 281. 1878. Wis.

§ 34. Authority to execute and deliver a policy of insurance includes authority to make a binding parol contract. Weeks v. Lycoming Ins. Co. 7 Ins. L. J. 552. 1878. U. S. Circuit, Vt.

§ 35. Testimony was that the assured met local agent of the company in front of the post office, and said to him: "I want to renew that insurance of mine; I am going away to be gone a week or ten days, and I want it done before I leave." He said 'all right.' I then said, 'Mr. Hopkins offers to insure my property at two per

cent, and you charged me two and a half last year; I don't want it in those local companies; I would rather have it in the same company and have it renewed; won't you do it at two per cent?' Answer, 'I will.' I said again, 'I am going to leave for Palmyra, and be gone for a week or ten days; is there anything else you want me to do?' 'No; nothing else; I have the description in the office, and will attend to it.' I said, 'Renew the old insurance policy for the same as it was before, and in the same company, and the same amount,' and he said, 'All right.' I went away that day and returned again in about ten days from the day before the fire." *Held*, not sufficient to constitute a parol contract of insurance. Taylor v. Phoenix Ins. Co. 47 Wis. 365. 1879.

§ 36. When contract for insurance is complete and a loss occurs before issue and delivery of the policy, assured may sustain a suit in equity to compel issue and delivery of the policy. *Woody v. Old Dominion Ins. Co.* 31 Grat. 362. 1879.

§ 37. A parol contract of insurance cannot be deemed to have merged into the policy where the latter is claimed not to conform to it, especially when assured has no knowledge of the terms of policy until after the loss. *Humphry v. Hartford Fire Ins. Co.* 15 Blatch. 504. 1879.

§ 38. There is no rule of law which, in cases outside of the statute of frauds, prevents policy from being changed by parol, or which requires insurance contracts to be in writing. *Roger Williams' Ins. Co. v. Carrington*, 9 Ins. L. J. 577. 1880. Mich.

§ 39. Charter of company providing that all policies issued should be in writing does not prevent a sufficient and valid oral contract of insurance. *Baile v. St. Joseph Fire Ins. Co.* 12 Rep. 366. Mo.

§ 40. When company institutes an action to have its policy declared void on the ground that it was issued after the loss upon an alleged parol agreement which the assured and agent knew to be insufficient, the assured

may set up in his answer his claim under the policy, and recover the amount of his loss. *Revere Fire Ins. Co. v. Chamberlin*, 10 Ins. L. J. 397. 1881. Iowa.

§ 41. When company has failed to issue a policy, there being a sufficient parol contract of insurance, it cannot avail itself of condition in policy requiring written consent to other insurance indorsed upon it. In such a case mere notice of other insurance is sufficient. And *semble*, even if policy is issued notice to agent and his verbal consent to other insurance estops company from setting up defense on ground of want of written consent. *Baile v. St. Joseph F. and M. Ins. Co.* 10 Ins. L. J. 657. 1881. Mo.

§ 42. In a suit brought upon a parol contract of insurance, to avoid circuity of action, equity will not only decree the issue of a policy, but award judgment for the amount due under it. *Baile v. St. Joseph F. and M. Ins. Co.* 10 Ins. L. J. 657. 1881. Mo.

§ 43. The requisites of a verbal contract of insurance are that the minds of the parties must have met upon all the essentials of the contract. These essentials are the parties, the subject-matter of insurance, the amount, the limits of the risk including its duration in point of time and extent in point of hazards assumed, the rate of premium, and generally all the circumstances which are peculiar to the contract and distinguish it from every other, so that nothing remains to be done but to fill up the policy and deliver it on the one hand and pay the premium on the other. *People's Ins. Co. v. Paddon*, 8 Bradwell, 447. 1881.

§ 44. When minds of the parties have met upon all the essential elements of the insurance, there is a sufficient parol contract binding the company in case of loss without delivery of policy, and such a contract is not void by the statute of frauds, although assured expected five years' policy. *Van Loan v. Farmers' Mut. Ins. Co.* 24 Hun, 132. 1881.

See Agent, § 23, 24, 58, Cancellation, 21. Consummation of Contract, 18. Other Insurance, 45. Proofs of Loss, 16, 67, 86. Renewal, 2. Risk, 22.

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## PAYMENT OF LOSS.

§ 1. The limit of sixty days prescribed for loss becoming due runs from the time of furnishing proof originally, and not from time of a subsequent examination of assured had at the instance of the company. Huchberger v. Home Ins. Co. 5 Biss. 106. 1870.

§ 2. Payment of a partial loss operates to reduce the amount of insurance. Lattomus v. Farmers' Mut. Ins. Co. 3 Houston (Del.), 404. 1873.

§ 3. The delay of sixty days to which a company is entitled after notice and proofs, is a substantial right secured by contract, not merely to enable it to prepare to pay, but also to investigate the circumstances under which loss occurred, with a view of determining whether or not the loss is of such a character as involves an obligation to pay at all. A general averment that plaintiff has complied with all the conditions on his part to be performed, does not show that the time has passed, and that loss is due and payable. Doyle v. Phoenix Ins. Co. 44 Cal. 264. 1872.

See Construction, § 5. Examination, 1. Proofs of Loss, 60, 78.

## PLACE OF MAKING CONTRACT.

§ 1. Where application is forwarded from one State to agent of company in another State, and policy is issued by such agent, the contract must be governed by the law of the latter State. *Lamb v. Bowser*, 7 Biss. 315. 1876.

§ 2. When policy is signed by the officers of a company in Missouri, but the condition is attached that it shall have no validity until countersigned by an agent in New York, where the policy is fully executed and delivered, *Held*, that the law of the latter State governs the rights of the parties under the contract. *Todd v. State Ins. Co.* 11 Phil. Rep. 355. 1876.

§ 3. When an application for insurance is accepted and the policy mailed in a certain State the contract must be adjudged to have been made in that State, and the contract is completed when the offer of the insured is accepted and the policy deposited in the post-office by the company, properly addressed to the insured. *Northampton Mutual Ins. Co. v. Tuttle*, 11 Vroom, L. R. 476. 1878.

See *Foreign Company*, § 18, 28, 29, 34. *Mutual Company*, 104, 114.

## PLEADING AND PRACTICE.

§ 1. A pleading that does not aver every fact to show a forfeiture, is bad on demurrer. Illinois Ins. Co. v. Stanton, 57 Ill. 354. 1870.

§ 2. A juror who admits a prejudice against all insurance companies is not competent to serve in that capacity in a suit where an insurance company is a party. Winnesheik Ins. Co. v. Schueller, 60 Ill. 465. 1871.

§ 3. Performance of conditions precedent to loss being due and payable, must be alleged in complaint or declaration. Rockford Ins. Co. v. Nelson, 65 Ill. 415. 1872. Home Ins. Co. v. Duke, 43 Ind. 418. 1873. Home Ins. Co. v. Lindsey, 26 Ohio, 348. 1875. Edgerly v. Farmers' Ins. Co. 43 Iowa, 587. 1876. Dolbier v. Agricultural Ins. Co. 67 Me. 180. 1877. Carberry v. German Ins. Co. 51 Wis. 605. 1881. Perry v. Phoenix Ins. Co. 12 Rep. 584. 1881. U. S. Circuit, R. I.

§ 4. The defense of existence of warranty and a breach must be set up in the answer to be available. Weed v. Schenectady Ins. Co. 7 Lans. 452. 1872.

§ 5. A specific averment of an insurable interest is not necessary in the declaration under the Ohio Code. People's Fire Ins. Co. v. Heart, 24 Ohio, 331. 1873.

§ 6. It is not sufficient to allege generally a refusal to submit to an examination; the answer should show when and by whom the request was made, that it was made within the sixty days, and time and place. Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315. 1874.

§ 7. The dissolution of a corporation terminates an action pending against it, unless continued by order of the court, under L. 1832, ch. 295. McCulloch v. Norwood, 58 N. Y. 562. 1874.

§ 8. An answer setting up a fraudulent statement of claim, should aver to whom it was made. Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315. 1874.

§ 9. A general averment "that plaintiff duly fulfilled all the conditions on his part to be performed" is sufficient averment under practice act of compliance with all conditions precedent. Ferrer v. Home Mut. Ins. Co. 47 Cal. 416. 1874.

§ 10. Where a condition becomes operative only in event of request in writing, the answer must aver such request. Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315. 1874.

§ 11. An answer setting up defense under condition in policy requiring assured to use his best endeavors to save property and prevent loss, &c., must also aver that it was in his power either to prevent the fire or loss of property. Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315. 1874.

§ 12. Waiver must be pleaded to be rendered available to assured. Martin v. Mutual Fire Ins. Co. 3 Pugsley, N. B. 157. 1875.

§ 13. Service of summons without the State by mail is authorized by 66 Ohio L. 327, only in suits on policies outstanding in the hands of a resident of that State. Heart v. Lycoming Fire Ins. Co. 26 Ohio, 594. 1875.

§ 14. When there are exceptions in the policy which qualify the company's liability or render it irresponsible in certain instances, so that in law it is not absolutely bound, the declaration must aver such exceptions, although it is not necessary to negative them. Simmons v. Ins. Co. 8 W. Va. 474. 1875.

§ 15. When policy refers to an application which in legal effect may be a warranty, it is not necessary to set out in the declaration the warranties contained in the application in whole or in part. Simmons v. Ins. Co. 8 W. Va. 474. 1875.

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§ 16. An allegation of a performance of a condition allows proof of waiver. *West Rockingham Fire Ins. Co. v. Sheets*, 26 Grat. 854. 1875.

§ 17. Averments which show that the parties were mistaken as to the effect of the language used in policy, are sufficient to authorize reformation of the contract, without a specific allegation of a mistake of fact. *Maher v. Hibernia Ins. Co.* 67 N. Y. 283. 1876. Aff'g 6 Hun, 353.

§ 18. When complaint expressly avers an insurable interest to have existed at time of effecting the insurance the legal presumption is that such interest continued until time of the loss. So held on demurrer, complaint not alleging interest at time of fire. *Roussel v. St. Nicholas Ins. Co.* 9 Jones & Sp. 280. 1876.

§ 19. Declaration must contain an averment that property destroyed was in the place described in the policy, otherwise it is bad on demurrer. *Todd v. Germania Fire Ins. Co.* 1 Mo. App. 472. 1876.

§ 20. Issue being upon agent's knowledge of encumbrances, assured testified that the agent did know of the mortgages. The agent denied such knowledge, and defendant proved and read a letter written by the assured to the home office after the loss, in which he stated "I know nothing about whether he (the agent) knew of the mortgage or not," and the assured attempted no explanation. Jury found in favor of plaintiff. *Held*, that verdict was contrary to the evidence, and judgment entered upon the verdict reversed. *Huntley v. Home Ins. Co.* 7 Ins. L. J. 134. 1876. Iowa.

§ 21. Evidence of waiver is properly received under a general allegation of performance of conditions. *Gans v. St. Paul Fire Ins. Co.* 43 Wis. 108. 1877.

§ 22. It is necessary to allege an interest in the property insured. *Quarrier v. Peabody Ins. Co.* 10 W. Va. 507. 1877.

§ 23. A defense of willful burning must be specially averred to be available. Evidence establishing such a defense is not admissible under the general issue. *Residence Fire Ins. Co. v. Hannawold*, 37 Mich. 103. 1877.

§ 24. A company cannot be sued *in covenant* upon an indorsement made upon the policy. *Shertzer v. Mutual Fire Ins. Co.* 46 Md. 506. 1877.

§ 25. *Semble* that when the truth of representations in an application are made condition precedent to a right of action on the policy, such an application and its correctness should be pleaded. *Ins. Co. v. McGookey*, 33 Ohio, 555. 1878.

§ 26. A declaration upon a contract of insurance will not sustain a recovery upon ground of negligence of company's agent in forwarding an application for insurance. *Walker v. Farmers' Ins. Co.* 51 Iowa, 679. 1879.

§ 27. The defenses of other insurance, existence of a mortgage, encumbrance, and a change of the occupancy of the premises, having a tendency to increase the risk, are all available to defendant and may be proved and established under the general issue. The rule is that under the general issue any matter which shows that the plaintiff never had a cause of action may be given in evidence, and also most matters in discharge of the action which show that, at the time of the commencement of the suit, the plaintiff had no subsisting cause of action. *Western Assurance Co. v. Mason*, 5 Bradwell, 141. 1879.

§ 28. Under Illinois practice a default on part of company admits every material allegation of the declaration, and leaves nothing but the assessment of damages to be determined. *Phoenix Ins. Co. v. Perkey*, 92 Ill. 164. 1879.

§ 29. A waiver, whether relied upon to prevent a forfeiture of policy on ground of concealment or breach of warranty, must be specially pleaded, and it must amount either to an agreement or an estoppel. In the latter case

the particulars, representations or conduct that have been relied or acted upon should be stated with reasonable certainty. *Texas Banking Co. v. Hutchins*, 53 Texas, 61. 1880.

§ 30. Waiver must be pleaded, and must amount to an agreement or estoppel. *Galveston Ins. Co. v. Heidenheimer*, 9 Ins. L. J. 592. 1880. Texas.

§ 31. It is not necessary for assured to aver and prove application made a warranty; he must show affirmatively performance of conditions precedent. It is for the defendant to aver and prove breach of warranties and conditions subsequent. *Redman v. Aetna Ins. Co.* 49 Wis. 431. 1880.

§ 32. When a renewal of policy originally issued in the name of two parties is made out in the name of one of them only and suit is brought by him alone, there is no variance. *Lockwood v. Middlesex Mut. Ins. Co.* 47 Conn. 553. 1880.

§ 33. When terms of policy are set out in the declaration, there must be a specific averment of performance of all conditions precedent. *Perry v. Phoenix Ins. Co.* 8 Fed. Rep. 643. 1881. U. S. Cir., R. I.

See Adjustment, § 9. Alteration, 2. Certificate, 16. Evidence, 45, 59. Foreign Company, 6, 33, 36, 42. Mortgagor and Mortgagee, 18. Mutual Company, 12, 36, 50, 59, 62, 183. Payment of Loss, 3. Proofs of Loss, 35, 85. Valued Policy, 2. Waiver, 57. Warranty and Representation, 72.

## PREMIUM.

§ 1. Receipt of premium by company with knowledge of facts constituting breach of condition in the policy operates as a waiver. *Mershon v. National Ins. Co.* 34 Iowa, 87. 1871.

§ 2. An acknowledgment of the receipt of a premium in a policy of insurance operates as an estoppel preventing the company from setting up as a defense non-payment of the premium. *Basch v. Humboldt Ins. Co.* 6 Vroom, N. J. L. R. 429. 1872.

§ 3. A condition making payment of the premium essential to validity of policy may be waived by the company or its authorized agent, and such waiver may be shown by direct proof that credit was given or can be inferred from circumstances. *Bodine v. Exchange Fire Ins. Co.* 51 N. Y. 117. 1872.

§ 4. When policy is delivered to a broker to be handed over to the assured if the premium note is paid, and the broker keeps the policy at the request of the assured, and while in his possession property is destroyed, premium not having been paid and condition in policy requiring its prepayment, *Held*, that company would not be bound by any credit or arrangement made by the broker with the assured. *Marland v. Royal Ins. Co.* 71 Pa. 393. 1872.

§ 5. If a policy be executed and delivered containing an acknowledgment of receipt of premium, company will not be permitted to allege a want of consideration for their promise when sued thereon after a loss. *Consol. Real Est. Co. v. Cashow*, 41 Md. 59. 1874.

§ 6. Company was accustomed to charging premiums to an agent authorized to receive and submit applications and to receive and deliver policies for such as were accepted. Credit for the premiums was given by such agent. *Held*, that by this usage premium was paid.

Train v. Holland Purchase Ins. Co. 62 N. Y. 598. 1875.  
Rev'g 1 Hun, 527.

§ 7. Policy provided that (1) premium was due and payable on delivery of policy; (2) that when credit was given to the extent of four months, policy should be in force during that time; (3) but unless premium was paid within the four months, company should not be liable for a loss occurring thereafter. It was delivered without exacting payment, and no time of credit was specified. The premium upon a previous policy obtained under similar circumstances had been paid and accepted after the expiration of the four months. A loss occurred after expiration of four months, and premium had not been paid. *Held*, evidence sufficient to sustain a finding of waiver of condition in regard to payment of premium. Bowman v. Agricultural Ins. Co. 59 N. Y. 521. 1875.

§ 8. If agents of company acting for themselves advance the money for the premium to the company and afterwards take the assured's note for the amount thereof as their own and negotiate the same, this is a sufficient compliance with a condition of the policy requiring premium to be actually paid before company should become liable. Home Ins. Co. v. Curtis, 32 Mich. 402. 1875.

§ 9. The delivery to an insurance broker of a policy and charging him with the premium in a general account in usual course of business by the agent of the company with its knowledge, is the equivalent of payment. Bang v. Farmville Ins. Co. 1 Hughes, 290. 1876.

§ 10. Whenever it can be inferred from all the circumstances and previous dealings between the parties, that credit was given for the premium, it is error to hold as matter of law that there was no waiver of prepayment of the premium according to condition of the policy, and to withhold that question from the jury. Church v. Lafayette Fire Ins. Co. 66 N. Y. 222. 1876. s. p. Société Bienfaisance v. Morris, 24 La. Ann. 347. 1872. Baldwin v. Chouteau Ins. Co. 56 Mo. 151. 1874. Latoix v. Germany Ins. Co. 27 La. Ann. 113. 1875.

§ 11. Policy was delivered by defendant's agent without payment of the premium, and no time was fixed when it should be paid. Payment was demanded several times, and on last occasion plaintiff said he would pay it in a few days. Policy was not canceled, nor was plaintiff notified that it would be void or canceled unless payment was made. *Held*, evidence of waiver of condition requiring prepayment. *Washoe Manufacturing Co. v. Hibernia Fire Ins. Co.* 66 N. Y. 613. 1876. *Aff'g 7 Hun, 74.*

§ 12. If a company chooses to issue its policy and to look to its agent for the premium, it must be considered as paid so far as the liability of the company is involved. *Planters' Ins. Co. v. Ray*, 52 Miss. 325. 1876.

§ 13. When a clerk leaves office of a company with a receipt which he is on certain terms empowered to give up to a person desiring to renew an insurance, and where the company has money of such person under its control, and where the premium is offered to the clerk and by him refused, and the receipt is left and no demand is made for its return, and the person holding it relies upon it as an insurance, company is estopped from denying its liability, even although private instructions may have been given to the clerk which he did not disclose, not to leave the receipt unless he was paid in cash. *Staunton v. Western Ins. Co.* 21 Grant Ch. 578; and see 23 Id. 81. 1876.

§ 14. Assured is only entitled to a return of the premium when the risk never attached. *Hawke v. Niagara District Ins. Co.* 23 Grant Ch. 139. 1876.

§ 15. It was the custom of company to deliver policies to broker without requiring cash payment of premium, charging the same to his individual account, and rendering to him monthly bills, deducting an agreed commission for obtaining risks. In his monthly settlements the broker paid the premiums charged to him, whether he had collected them or not, and in this particular case he offered to pay the premium at his first settlement after the issue of the policy, and after the fire. *Held*, evidence justified finding that company had accepted the individual credit

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of the broker as a payment of the required premium. *White v. Connecticut Ins. Co.* 120 Mass. 330. 1876.

§ 16. Delivery of policy to the assured waives condition requiring prepayment of premium. *Mason v. Citizens' Fire Ins. Co.* 10 W. Va. 572. 1877.

§ 17. A negotiable promissory note of broker accepted by the company on account of the premium, is *prima facie* payment of it, and discharges the assured. *Union Ins. Co. v. Grant*, 68 Me. 229. 1878.

§ 18. The giving of credit by a local agent to a broker may operate as a payment, in legal effect, of the premium, preventing cancellation by the company without paying or tendering the return premium. *Bennett v. Maryland Fire Ins. Co.* 14 Blatch. 422. 1878.

§ 19. Policy having once attached, company can rely upon a forfeiture without the return or offer to return any portion of the premium. The usual provision in a policy giving company the option to cancel it applies only where the company sees fit to cancel the policy, and not in cases where there is a forfeiture resulting from the act of the assured. *Phoenix Ins. Co. v. Stevenson*, 78 Ky. 150. 1879.

§ 20. President of an insurance company who issues policies with knowledge that the statute authorizing its organization has not been complied with, is guilty of fraud, and personally liable for the repayment of premiums thus obtained. *Belding v. Floyd*, 17 Hun, 208. 1879.

§ 21. When assured tenders the money to local agent of the company for the premium and he declines to take it, saying that he has in his hands money belonging to him for rent, and will credit him by that amount, it is equivalent to payment. *Wooddy v. Old Dominion Ins. Co.* 31 Grat. 362. 1879.

§ 22. Evidence that company had marked policy renewed, and of custom thus to mark policies renewed before payment of premium, and that such practice was recognized by the general agent, and that such renewals

were understood to be subject to such agent's disapproval, and the local agent being charged with the amount of the premium, and that the condition in regard to payment of renewal premiums was not attended to, and that on previous renewal of policy issued premium was received and accepted after the issue of the policy, *Held*, to be evidence of waiver of condition in regard to prepayment of the premium for renewal. *Peppit v. N. B. & M. Ins. Co.* 1 Russel & G. 219. 1879.

§ 23. Policy is not rendered void by the fact that agent of company has consented to assured's paying the premium with credit of the amount upon his individual account. *Jones v. Aetna Ins. Co.* 8 Ins. L. J. 415. 1879. U. S. Circuit, Mass.

§ 24. If agent pays premium to company, giving credit for the whole or a part to the assured, such payment is sufficient, and if policy remains in the hands of the agent it may be inferred that he holds it for the assured, payment of the premium being evidence that policy has been accepted. *Wheeler v. Watertown Fire Ins. Co.* 10 Ins. L. J. 354. 1880. Mass.

See Agent, § 1, 9, 17, 21, 22, 30, 56, 72, 78. Alienation, 14. Consumption of Contract, 5, 7. Estoppel, 6. Evidence, 83. Explosion, 6. Foreign Company, 1, 10. Increase of Risk, 23. Mortgagor and Mortgagee, 40. Mutual Company, 25, 27, 99, 117, 139, 152. Renewal, 1, 4. Storing and Keeping, 3. Taxation, 2. Usage and Custom, 6, 7. Waiver, 10, 12. Warranty and Representation, 33, 68.

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## PROOFS OF LOSS.

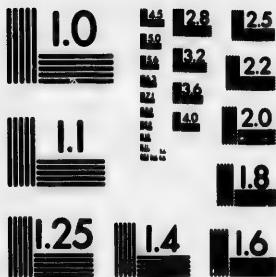
§ 1. Silence upon receipt of proofs is no evidence of waiver; but if objections are made on other grounds without objecting to the sufficiency of proofs, it may have that effect. *McManus v. Aetna Ins. Co.* 6 Allen, N. B. 314. 1865.

§ 2. Appointment of an agent and investigation by him of the circumstances of the loss does not amount to a waiver of notice of loss and proofs. Company may insist upon an investigation for the very purpose of ascertaining whether it is a case in which they ought to waive conditions of its policy. *Sharswood, J. Bush v. Ins. Co.* 6 Phil. Rep. 252. 1867.

§ 3. An objection based on a strict literal construction of the language of the policy, that no one but the assured can give notice, and that the proofs must be verified by his oath, and cannot under any circumstances be verified by the oath of another, is too refined and unreasonable to merit consideration. When the assured is permanently absent and totally ignorant of the loss or destruction of the property and value, the circumstances attending it, as also of the value and quantity of the property destroyed, his wife may execute and furnish the proofs and do other necessary acts required of the assured. Her authority may be established by her own testimony, to the effect that before her husband left he told her "to take care of the place and property until he returned; to take care of it the same as himself until he returned." *O'Connor v. Hartford Fire Ins. Co.* 31 Wis. 160. 1872.

§ 4. In case where the fire has not only consumed the goods insured, but all books and vouchers from which an account could be made, the insured is not required to do what would be vain and impossible, but only to such performance of the conditions in regard to proofs of the

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amount and extent of his loss as the nature of the case will admit. *Jones v. Mechanics' Fire Ins. Co.* 7 Vroom, N. J. L. R. 29. 1872.

§ 5. Proofs were served April 3d, 1871. Objections were made and further particulars were required May 24th, 1871. Additional proofs were served June 6th, 1871. July 20th, 1871, further proofs were required. All the books and proofs in the assured's possession had been submitted to the inspection of the company's adjusting agent before suit was brought. *Held*, that these facts were proper to be submitted to the jury as evidence of a failure of complete preliminary proofs on the part of the assured at the first service. *Jones v. Mechanics' Fire Ins. Co.* 7 Vroom, N. J. L. R. 29. 1872.

§ 6. Where an adjuster, after having examined into the facts relative to the fire and the amount of the property, states to the assured that he could not recommend the company to pay the loss, as it appeared from their statements that they had sold more goods than they had purchased, in substance claiming that the assured had no claim under the policy, it is in legal effect a denial of all liability and operates as a waiver of the right to demand proofs of loss. *McBride v. Republic Fire Ins. Co.* 30 Wis. 562. 1872.

§ 7. Company's objections to proofs must be promptly made. *O'Connor v. Hartford Ins. Co.* 31 Wis. 160. 1872. *Planters' Mut. Ins. Co. v. Deford*, 38 Md. 382, 404. 1873. *Patterson v. Triumph Ins. Co.* 64 Me. 500. 1874. *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241. 1874. *Swan v. Liv., Lond. and G. Ins. Co.* 52 Miss. 704. 1876. *Young v. Hartford Ins. Co.* 45 Iowa. 378. 1877. *Mercantile Ins. Co. v. Holthouse*, 9 Ins. L. J. 535. 1880. Mich. And if not specifically made and pointed out, they are waived; and same result follows if objection is made to the loss upon a certain ground, in reference to all other objections which could have at the time been made. *Aurora Fire Ins. Co. v. Kranich*, 36 Mich. 289. *Ins. Co. N. A. v. Hope*, 58 Ill. 75. 1871. *Winnesheik Ins. Co. v. Schuller*, 60 Ill. 465. 1871. *Humphrey v. Hartford Ins.*

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§ 8. Claiming policy to be void and denial of all liability operates as a waiver of proofs. Bachelor v. People's Ins. Co. 40 Conn. 56. 1873. Lycoming Ins. Co. v. Dunmore, 75 Ill. 14. 1874. Parker v. Amazon Ins. Co. 34 Wis. 364. 1874. Planters' Ins. Co. v. Comfort, 50 Miss. 662. 1874. Field v. Ins. Co. N. A. 6 Biss. 121. 1874. West Rockingham Fire Ins. Co. v. Sheets, 26 Grat. 854. 1875. Williamsburg City Ins. Co. v. Cary, 83 Ill. 453. 1876. Akin v. Liv., L. and G. Ins. Co. 6 Ins. L. J. 341. 1877. U. S. Circuit, Ark. Germania Ins. Co. v. Castrel, 7 Ins. L. J. 253. 1877. Ill. Blennett v. Maryland Ins. Co. 14 Blatch. 422. 1878. Crawford Co. Mut. Ins. Co. v. Cochran, 88 Pa. 230. 1878. People's Ins. Co. v. Straehle, 2 Cin. Supr. 186. 1878. Aetna Ins. Co. v. Sparks, 62 Ga. 187. 1879. Portsmouth Ins. Co. v. Reynolds, 32 Grat. 613. 1880. Harriman v. Queen Ins. Co. 49 Wis. 71. 1880. Rumsey v. Phoenix Ins. Co. 17 Blatch. 527. 1880. Farmers' Ins. Co. v. Meckes, 10 Ins. L. J. 707. 1880. Pa. Farmers' Ins. Co. v. Moyer, 10 Ins. L. J. 514. 1881. Pa. And loss becomes immediately due and payable notwithstanding the limitation of sixty days contained in the policy. Cobb v. Ins. Co. N. A. 11 Kans. 93. 1873.

§ 9. Where condition requires immediate notice or proofs, it means "as soon as possible under the circumstances" (Cashau v. N. W. National Ins. Co. 5 Biss. 476. 1873), "due diligence" (Continental Ins. Co. v. Lippold, 3 Neb. 391. 1874), "within reasonable time" (Rokes v. Amazon Ins. Co. 51 Md. 512. 1879).

§ 10. A mere letter of advice from a soliciting agent of company to the assured, on receipt of notice of loss, to the effect that he would notify the company and that some one would come to adjust the loss, cannot be construed as a waiver of proofs. *Forest City Ins. Co. v. School Directors*, 4 Bradwell, 145.

§ 11. Objections to proofs must be made known to assured in such time that they can be remedied. *Ex Parte Norwood*, 3 Biss. 504. 1873.

§ 12. Service of copies of notice and proofs on re-insuring company, and retention without objection, sufficient compliance with conditions in regard to them. *Cashau v. Northwestern Nat. Ins. Co.* 5 Biss. 476. 1873.

§ 13. A statement in proofs of loss that there was other insurance, is not an admission that the *assured* had other insurance. Insurance had by the assured and other insurance upon the property are not the same. When, therefore, the company is obliged to supplement the statement in proofs by other evidence, the assured has a right to contradict it, and a finding in his favor by the trial court or jury is conclusive. *McMaster v. Ins. Co. of N. A.* 55 N. Y. 222. 1873.

§ 14. Assured is not estopped by a statement in proofs of loss from proving the contrary or different fact. *Parmelee v. Hoffman Fire Ins. Co.* 54 N. Y. 193. 1873. *s. p. McMaster v. Ins. Co. N. A.* 55 N. Y. 222. 1873. *Cummins v. Agricultural Ins. Co.* 67 N. Y. 260. 1876.

§ 15. Policy insured "the People." Proofs were made and furnished by the vice-president of an asylum, the property insured and burnt. *Held*, that as the State can only act through agents, and the legislature having recognized the board of trustees and placed them in charge of the asylum as such agents, the authority of the vice-president could not be disputed. *People v. Liv., Lond. and G. Ins. Co.* 2 T. & C. (N. Y. Sup.) 268. 1873.

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§ 16. If company denies all liability under an interim receipt for insurance, there is no necessity of assured complying with conditions precedent, to loss being due and payable as contained in the policies that are ordinarily used and issued. *Goodwin v. Lancashire Fire Ins. Co.* 18 L. C. Jurist, 1. 1873. Reversing 16 L. C. Jurist, 298.

§ 17. Policy provided that proofs should be furnished within 15 days, and that "until such proofs were furnished no right of action should accrue." *Held*, that the last clause qualified the former and must be considered in connection, and that therefore the furnishing of proofs by the assured, although after the expiration of the 15 days, was in time. *Lafarge v. Liv., Lond. & Globe Ins. Co.* 17 L. C. Jurist, 237. 1873.

§ 18. Assured produced a book into which a number of invoices were pasted and a small diary in which numerous memoranda were made. From these he made an extract saying his total stock was so much and his sales so much, and as he had stock on hand previous to the date of these invoices amounting to about \$2,400 and only \$600 being saved in a damaged state, therefore his loss amounted to so much. *Held*, that plaintiff had not given a particular and total statement of his loss as required by condition of the policy in regard to proofs. *Stickney v. Niagara District Mut. Ins. Co.* 23 Up. Can. C. P. 372. 1873.

§ 19. If there be any evidence from which a waiver of proof may be inferred, it should be left to the jury. *Farmers' Ins. Co. v. Taylor*, 73 Pa. 342. 1873.

§ 20. Policy required the assured in case of loss to furnish a particular account of it, which should include a statement of the true nature of his title at the time of the fire. In his proofs of loss assured stated that he was "*bona fide* owner of the property, holding same by possession for or during the last 35 years by myself and my father." The property in question was a barn. It appeared that at the time of making such statement the assured knew that a recovery in ejectment had been actually had against him some weeks before the fire by one having a better

legal title. *Held*, that the barn was to be considered as a part of the freehold; that such statement was not a compliance with the condition, and the plaintiff could not recover; and, *Held*, that he could not subsequently maintain an action upon the theory that the barn was a chattel. *Sherboneau v. Beaver Mutual Fire Ins. Co.* 30 Up. Can. Q. B. 472. 1870.

§ 21. Policy covered \$1,400 on dry goods and clothing; \$400 on groceries and crockery; \$200 on boots and shoes. Assured in his proofs of loss gave total of stock on hand at a certain date, of merchandise purchased since that date, merchandise sales during the same period, goods saved as per inventory, which being objected to, *Held*, that assured was bound to give a particular account of his loss under each *item* insured, and the furnishing of a general account covering all under the head or name of stock or merchandise was not a compliance with the condition. *Lindsay v. Lancashire Fire Ins. Co.* 34 Up. Can. Q. B. 440. 1874.

§ 22. When assured is informed by local agent that "it is useless and loss of time to make up proofs, that company is bankrupt," it is a waiver. *Pennell v. Lamar Ins. Co.* 73 Ill. 303. 1874.

§ 23. The question of due diligence in furnishing of proofs is proper to be submitted to the jury. *Continental Ins. Co. v. Lippold*, 4 Ins. L. J. 430. 1874. Neb.

§ 24. When mortgagor and assured declined to furnish proofs of loss, and plaintiff, to whom loss was originally made payable but who had acquired the title under foreclosure with knowledge and consent of the company, under instructions of its agent made and furnished them, and company about ten days after their receipt notified plaintiff that "proofs were not made as required by policy, and that they would not be recognized as proofs," and none other were made. *Held*, that under the circumstances plaintiff was not bound to furnish additional proofs upon a general notice without specification of the defect claimed. *Pratt v. N. Y. Central Ins. Co.* 55 N. Y. 505. 1874.

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§ 25. *Semble*, that the assured is bound by statement of the amount of his loss as claimed in the proofs, and can recover no more, although evidence on trial may tend to show the loss to exceed such amount. *De Grove v. Metropolitan Ins. Co.* 61 N. Y. 594. 1875. See § 85.

§ 26. Full compliance with condition precedent to loss being due and payable is indispensable to right of action, unless compliance is impossible or is waived by the company. *O'Brien v. Commercial Fire Ins. Co.* 63 N. Y. 108. 1875.

§ 27. Where facts are undisputed due diligence in furnishing notice and proofs is a question of law. *Knick-erbocker Ins. Co. v. Gould*, 80 Ill. 388. 1875.

§ 28. Objection as to time in furnishing proofs is not waived by retention and silence. *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388. 1875. *Bell v. Lycoming Ins. Co.* 19 Hun. 238. 1879.

§ 29. When policy has been assigned in trust, the assured must execute and furnish the proof. *Whyte v. Western Ins. Co.* 22 L. C. Jurist, 215. 1875.

§ 30. An agent waives compliance with condition in regard to proofs by telling assured to obtain the information required after he should get home as soon as possible, and that that would do. *Cann v. Imperial Fire Ins. Co.* 1 Russel & C. N. S. 240. 1875.

§ 31. Proofs of loss are admissible in evidence only for purpose of showing compliance with the condition. *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388. 1875. *Edgerly v. Farmers' Ins. Co.* 48 Iowa, 644. 1878. But it seems their effect should be so limited by objection and instruction. *Ins. Co. of N. A. v. Zaenger*, 63 Ill. 464. 1872.

§ 32. When policy requires that proofs shall be made within a reasonable time the question as to what is a reasonable time is a mixed question of law and fact to be

submitted to the jury under proper instructions. *Swan v. Liv., Lond. & Globe Ins. Co.* 52 Miss. 704. 1876.

§ 33. When policy is made payable to a third party, proofs must be made by the assured. Condition requiring proof to be furnished as soon as possible, means within a reasonable time. When furnished four months after the fire the lapse of such time cannot be deemed reasonable. *State Ins. Co. v. Maackens*, 9 Vroom, N. J. L. R. 564. 1876.

§ 34. If assured by act or declaration of company's agent is induced not to furnish proofs within the prescribed time, it is a waiver. *Georgia Home Ins. Co. v. Kinnier*, 28 Grat. 88. 1876.

§ 35. Pleading other defenses does not waive defense founded upon non-compliance with condition in regard to proofs of loss. *Farmers' Ins. Co. v. Frick*, 29 Ohio, 466. 1876.

§ 36. Policy was in the joint names of two parties who were partners in business. After the fire and two months after the making and delivery of the statement of loss one of the partners assigned all his interest, &c., in the policy to the plaintiff. *Held*, that the action was properly brought in the name of the plaintiff alone, and there was no objection in the fact that the proofs were sworn to by one partner (the plaintiff), being otherwise sufficient. *Hutchinson v. Niagara District Ins. Co.* 39 Up. Can. Q. B. 483. 186.

§ 37. Proofs of loss cannot be furnished by a party to whom loss is made payable. *Stanton v. Home Fire Ins. Co.* 21 L. C. Jurist, 211. 1876.

§ 38. Policy required assured to state in his proofs of loss "the whole value and ownership of the property insured." *Held*, assured is not required to make any statement in regard to encumbrances. *Taylor v. Aetna Ins. Co.* 120 Mass. 254. 1876.

§ 39. Secretary wrote letter to assured after a loss in which after acknowledging receipt of notice of the fire

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and "of request for proof blanks," he added, "We have no proof blanks at hand. It will probably be two weeks before our adjuster can reach this case." *Held*, this was no waiver of timely service of proofs of loss. *Birmingham v. Farmers' Joint Stock Ins. Co.* 67 Barb. 595. 1876.

§ 40. Policy contained conditions as follows: "No act or omission of the company, or any of its officers or agents, shall be deemed construed or held to be a waiver of a full and strict compliance with the foregoing provision (in regard to proofs), nor of any extension of time for compliance, except it be a waiver or extension in express terms and in writing, signed by the president or secretary." Also "said policy is made and accepted upon the foregoing terms, conditions, and restrictions, and that nothing less than a distinct specified agreement in writing, signed by an officer of the company, shall be construed as a waiver thereof." *Held*, that these conditions were operative, and that a letter from defendant's secretary, after a fire, to the assured, acknowledging receipt of notice of fire and request for proof blanks and stating that he had no blanks, and that adjuster could not attend to case for two weeks, could not be construed as an "agreement" or waiver. *Birmingham v. Farmers' Joint Stock Ins. Co.* 67 Barb. 595. 1876.

§ 41. A reformation of policy does not require assured to furnish new or further proofs of loss. *Maher v. Hibernia Ins. Co.* 67 N. Y. 283. 1876.

§ 42. Where condition requires furnishing of proofs within certain specified time, they must be furnished in such time unless waived. *Blossom v. Lycoming Fire Ins. Co.* 64 N. Y. 162. 1876.

§ 43. If, after time for furnishing proofs has passed, agent of company acts and speaks as if they had been presented in season, or if, while resisting claim upon his company, he places his objections entirely upon other grounds, and never alludes to the failure to furnish the proofs and expressly waives another condition, jury may infer a waiver. *Home Ins. Co.* 3 Otto, 527. 1876.

§ 44. When company notifies the assured after the loss that the property will be replaced and directs the agent of the assured not to complete the proofs, in consequence of which the latter are not made out and received by the company in the 30 days prescribed by a condition of the policy, *Held*, sufficient evidence of waiver for submission to the jury. *State Ins. Co. v. Todd*, 83 Pa. 272. 1877.

§ 45. Agent of the company was present at the fire, and next day assisted the assured in opening his safe and securing its contents. Notice of the event was immediately communicated to the company, who in seven to nine days sent out an adjuster who received proofs, and did not require any further or additional proofs. *Held*, sufficient to satisfy obligation upon insured to furnish proofs within reasonable time. *Kennedy v. Ins. Co.* 6 Ins. L. J. 359. 1877. Tenn.

§ 46. Retention of proofs for a period of thirty-eight days, with knowledge of defect without making the objection, will sustain a finding that proofs were accepted as sufficient and of a waiver. *Keeney v. Home Ins. Co.* 71 N. Y. 396. 1877.

§ 47. Fire occurred November 23, 1865. Proofs were not served until February 16, 1866, although completed and verified January 8, 1866. No reason appeared for the delay. Payment was refused on ground of fraud. Court charged the jury that if defendant objected to payment on ground of fraud, it was not essential to serve proofs, and that in such case there was a waiver. *Held*, error; that if proofs were not served in time, and the company had done nothing to induce the omission, the fact that the company thereafter refused to pay, without assigning any reason, or only assigning one of many, did not amount to a waiver, and did not estop it from insisting upon any other defenses. It was not bound to specify all of its defenses on peril of losing those not specified. *Brink v. Hanover Fire Ins. Co.* 70 N. Y. 593. 1877.

§ 48. Court charged the jury that "if they believed company promised to pay without suit in event of a son

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of assured being released from arrest on a complaint of arson, it was for them to consider whether such promise, together with the fact of an appraisement voluntarily made by the defendant, had the effect on plaintiff's mind of preventing his taking further steps in furnishing proofs, or of preventing his bringing an action, and that if they found affirmatively, there was a waiver." *Held*, no error. *Solomon v. Metropolitan Ins. Co.* 10 Jones & Sp. 22. 1877.

§ 49. By accepting an answer which gives an aggregate valuation of all the property insured in reply to a question as to value, company waives a separate valuation of the different items in the policy. *Residence Fire Ins. Co. v. Hannawold*, 37 Mich. 103. 1877.

§ 50. The provision requiring that the interest of the assured shall be set forth in proofs of loss, with names of the true owners, is directory merely, and if not complied with to satisfaction of company, further information should be called for. *Foule v. Springfield Ins. Co.* 122 Mass. 191. 1877.

§ 51. Under a condition requiring assured to furnish a particular account of the loss, and if required to produce his books of account and other papers, vouchers and original or duplicate invoices, assured is bound to give all information and particulars reasonably required, &c., in his power to give. *Goldsmith v. Gore District Fire Ins. Co.* 27 Up. Can. C. P. 435. 1877.

§ 52. Honest statement of facts in proofs cannot enlarge their legal effect and make them a defense, if they would not otherwise be one. *City Five Cent Sav. Bank v. Penn. Ins. Co.* 122 Mass. 165. 1877.

§ 53. When assured is notified by company that it will rebuild and that he may defer the making of proofs, there is a waiver of condition requiring proofs in thirty days. *State Ins. Co. v. Todd*, 6 Ins. L. J. 893. 1877. Pa.

§ 54. A special and adjusting agent occupying part of home office of company, upon receiving papers or

proofs of loss, waives further proofs by saying in response to an inquiry that nothing further is required. *Edgerly v. Farmers' Ins. Co.* 48 Iowa, 644. 1878.

§ 55. Although policy provides that proofs shall be furnished at the home office, delivery to a local agent and retention by him without objection operates as a waiver. *German Ins. Co. v. Ward*, 90 Ill. 550. 1878.

§ 56. Substantial compliance with conditions in regard to notice of loss, proofs and adjustment, is all that is required. *Willis v. Germania Ins. Co.* 79 N. C. 285. 1878.

§ 57. Assured is not estopped by a sworn statement in his proofs of loss as to cause or origin of the fire, from showing contrary on the trial. *Smiley v. Citizens' Fire Ins. Co.* 14 W. Va. 33. 1878.

§ 58. When policy fixes no definite time for furnishing proofs of loss assured may do so in a reasonable time, and if it is done at any time and the proofs are not objected to on account of being too late, but are received and kept without objection, the company is estopped from setting up as a defense that the account was rendered too late. *Palmer v. St. Paul Fire Ins. Co.* 44 Wis. 201. 1878.

§ 59. When company objects to proofs and promises that when the corrections shall be made they will be received, knowing that it would be impossible for the assured to make them and return the proofs in the time limited by the policy, company is estopped from insisting upon the failure to furnish proofs in the time limited as a defense. *Hicks v. Empire Ins. Co.* 6 Mo. App. 254. 1878.

§ 60. When policy recites that payment is to be made 60 days after notice proof and adjustment of the loss "in conformity with the conditions annexed to this policy," such conditions referred to become a part of the contract. *Kensington National Bank v. Yerkes*, 86 Pa. 227. 1878.

§ 61. Silence on part of company upon receipt of proofs furnished after the expired time, does not operate as a waiver, nor does mere statement by the company at such time that it does not consider itself liable have that effect. *Masse v. Hochelaga Mut. Ins. Co.* 22 L. C. Jurist, 124. 1878.

§ 62. The whole dispute and controversy was in regard to amount of the claim. In reply to a notification by attorney of suit, company wrote " \* \* \* the company will contest the claim (in its present exaggerated form) under the terms and conditions of the policy, though we should have preferred an amicable compromise. \* \* \* If you prefer litigation with this company, we shall contest the claim as above." *Held*, error to charge jury that such letter constituted a waiver of proofs. *Farmers' Fire Ins. Co. v. Mispelhorn*, 50 Md. 180. 1878.

§ 63. Notice of loss and furnishing of proofs are conditions precedent, compliance with which must be shown, unless waived. Nine days after limited time is too late. *McDermott v. Lycoming Fire Ins. Co.* 12 Jones & Sp. 221. 1878.

§ 64. Agent after taking sworn statement of assured expressly told him that what had been done in taking his statement in writing was not intended to waive the proofs required by the policy; that he would leave with the local agent of the company a blank form of proofs and that the local agent would if desired aid in filling them up; the blank was then shown to the assured and also clause in policy in regard to proofs. *Held*, not sufficient evidence of waiver of proofs. *Ins. Co. of N. A. v. Bainbridge*, 7 Ins. L. J. 772. 1878. Ky.

§ 65. Submission to arbitration of the amount of loss waives all proofs. *Bammesel v. Brewers' Fire Ins. Co.* 7 Ins. L. J. 767. 1878. Wis.

§ 66. *Semble*, that when assured holds four policies of the same company upon same property he is not required to furnish more than one proof of loss. *Dakin v. Liv., L. and G. Ins. Co.* 13 Hun, 122. 1878.

§ 67. When action is brought upon a parol contract of insurance, evidence that a policy was refused is equivalent to a denial of all liability, and is a waiver of proofs. *Weeks v. Lycoming Ins. Co.* 7 Ins. L. J. 552. 1878. U. S. Circuit, Vt.

§ 68. Notice of loss was given to the local agent, who informed the company, and latter sent an adjuster to ascertain the loss. The adjuster told the assured to go before a justice of the peace and make proof of the loss, saying he had blanks for the purpose. They started together, and then occurred conversation in reference to settlement, and an attempt to fix the sum, which however was not agreed upon. Finally adjuster left, saying he would pay a certain sum which was not accepted and afterwards withdrawn. Subsequently assured called at office of local agent to accept proposition of settlement and was informed that it was withdrawn. *Held*, that while constituting a waiver as to time, it was no evidence of a waiver of condition requiring proofs. When informed of the withdrawal of the offer it was the duty of the assured then to have complied with the condition. *Warner v. Ins. Co. of N. A.* 7 Ins. L. J. 628. 1878. Pa.

§ 69. It is a question for a jury to determine whether delay in furnishing proofs is unreasonable and whether they have been furnished "as soon as possible" after a fire. *O'Brien v. Phoenix Ins. Co.* 76 N. Y. 459. 1879.

§ 70. Mailing proofs of loss, postage prepaid, is, in the absence of evidence that they were not received, presumptive evidence that they were received by the company in due course of mail. *Bell v. Lycoming Fire Ins. Co.* 19 Hun, 238. 1879.

§ 71. Waiver of proofs may be inferred from acts and conduct of the company inconsistent with an intention to insist upon strict performance of the condition. *Rokes v. Amazon Ins. Co.* 51 Md. 512. 1879.

§ 72. Policy provided that assured should give notice of fire forthwith, "and within fifteen days at latest, fur-

nish a particular account, &c., \* \* \* and in default thereof, no claim should be payable until such notice, account, &c., are given and produced." Assured having furnished an account twenty-two days after fire, *Held*, that his furnishing such account, from peculiar wording of the condition, was not a condition precedent to his right to recover. *Weir v. Northern Cos. Ins. Co.* 4 L. R. Ireland, 689. 1879.

§ 73. When loss has been made payable to a third party, who becomes the owner of the goods insured by a warehouse receipt, the latter becomes the party insured, and can make and furnish all necessary proofs. *Stanton v. Home Ins. Co.* 24 L. C. Jurist, 38. 1879.

§ 74. Policy insured one Jack as owner, and plaintiff as mortgagee, loss, if any, being made payable to latter, by whom it was obtained. Jack was an infant three years of age, a Mrs. Gleavey being guardian. After a fire, being unable to obtain proofs signed by assured or guardian, the plaintiff brought action against the owner, guardian, and insurance company, asking that guardian be directed to make, or that some proper person be appointed as special guardian to make, and who should be required to make, the necessary proofs; that the insurance company be adjudged to pay amount of loss, and that the limitation clause in policy for bringing of an action be not allowed to attach or take effect as against the plaintiff. Upon demurrer, *Held*, sustaining the demurrer, that the action could not be maintained. *Graham v. Phoenix Ins. Co.* 77 N. Y. 171. 1879.

§ 75. Policy insured "Margaret E. Jack, as owner, and William Graham, mortgagee." Proofs of loss were made and furnished by the latter, and returned by the company with objection that they should be executed by owner, who was an infant three years of age, and suggesting necessity of a legal guardian. In an action by the mortgagee, *Held*, that the plaintiff was primarily insured, and that the case was one of joint insurance, and that his act in furnishing proofs was the act of both the assured. *Graham v. Phoenix Ins. Co.* 17 Hun, 156. 1879.

§ 76. When insured property is an organ and is totally destroyed, assured is not required, under a demand for a further schedule after proofs are furnished, to furnish any further particulars; that the schedule required must be construed as meaning an inventory, and an inventory of a single article is made by naming the article. If company has a right to a full description of all the specifications of the organ under such circumstances, it does not become operative by a mere demand for a schedule. Smith v. Commonwealth Ins. Co. 49 Wis. 322. 1880.

§ 77. When a loss occurs on the night of the 29th and 30th of the month, and the plaintiff mails proofs on the 29th of the following month, which are received by the company on the 31st, condition requiring that they be furnished within thirty days, *semble* that there is sufficient compliance with the condition. Badger v. Glen's Falls Ins. Co. 49 Wis. 389. 1880.

§ 78. When company has examined the assured under oath, and thus waived formal proofs, the sixty days prescribed to run before the loss shall become due and payable, commences from the time of the delivery of such examination to the agent of the company. Badger v. Phoenix Ins. Co. 49 Wis. 396. 1880.

§ 79. When company demands that the assured shall submit to an examination under oath before formal proofs of loss have been made, and he submits, and answers all questions propounded to him, there is a waiver of proofs, unless assured is notified that the company requires formal proofs in addition to the examination. Badger v. Phoenix Ins. Co. 49 Wis. 396. 1880.

§ 80. Delivery of proofs to general agent at his request is a waiver of any right to have them delivered at the home office of the company. Badger v. Phoenix Ins. Co. 49 Wis. 396. 1880.

§ 81. Acceptance of proofs after the expiration of the time prescribed by the condition, and statement that company refuses to acknowledge any claim, amounts to a

waiver. *Kelly v. Hochelaga Mut. Fire Ins. Co.* 24 L. C. Jurist, 298. 1880.

§ 82. Where loss is made payable to a mortgagee with "mortgagee clause" attached, proofs of loss may be made and furnished by the latter, the owner refusing, and policy not expressly providing otherwise. *Graham v. Firemen's Ins. Co.* 8 Daly, 421. 1880.

§ 83. If company intends to avail itself of objection that proofs are not furnished in time, it should refuse to receive them on that ground, or at least promptly notify the assured of its determination, otherwise objection should be regarded as waived. *Brink v. Hanover Fire Ins. Co.* 80 N. Y. 108. 1880.

§ 84. When policy requires furnishing of proofs of loss "as soon as possible," reasonable diligence is all that is required, and this is a question for jury. *Brink v. Hanover Fire Ins. Co.* 80 N. Y. 108. 1880.

§ 85. Assured may be permitted to amend his proof of loss and complaint upon the trial, so as to make the demand \$2,000 instead of \$800, as originally claimed; such amount being the full amount named in the policy. *Miaghan v. Hartford Fire Ins. Co.* 24 Hun, 58. 1881.

§ 86. In an action upon a parol contract of insurance, it appeared that company had refused to issue a policy and denied all responsibility. *Held*, waiver of proofs required by condition in the policy. *Paile v. St. Joseph F. & M. Ins. Co.* 10 Ins. L. J. 657. 1881. Mo.

See Agent, § 44, 46. Books of Account, 3, 4. Certificate, 5. Construction, 5. Estoppel, 3, 19. Evidence, 11, 18, 22, 73, 79, 91. Examination, 1. Fraud and False Swearing, 6. Mutual Company, 10. Notice of Loss, 8, 17. Other Insurance, 49. Payment of Loss, 1, 8. Rebuild, 8. Re-insurance, 11. Vacant or Unoccupied, 36. Waiver, 5, 27, 29, 35. Who may Sue, 1.

## QUESTIONS FOR COURT AND JURY.

§ 1. A question as to waiver of notice of loss is proper to be submitted to the jury. *Drake v. Farmers' Union Ins. Co.* 8 Grant Cas. 325. 1862.

§ 2. The construction of a writing is a question of law for the court; although it seems the intention of the parties may be submitted to the jury, without constituting error sufficient to reverse the judgment, where it appears that the jury have construed it as the court should have done. *Germania Fire Ins. Co. v. Curran*, 8 Kans. 9. 1871.

§ 3. The materiality of a representation is a question of fact for the jury, but the policy may itself provide what facts shall be deemed material by converting the representation into a warranty or by mere stipulation as to its materiality. In such case where the parties have so agreed, the agreement precludes all inquiry upon the subject. *Gershauser v. N. B. & Mercantile Ins. Co.* 7 Nev. 174. 1871.

§ 4. It is for the jury to say whether the assured has strictly and literally complied with the warranty to keep a watchman in the mill when not in use. *Power v. City Fire Ins. Co.* 8 Phil. Rep. 566. 1871.

§ 5. Questions as to the meaning of particular words used in a special sense are for the jury. *Pitney v. Glen's Falls Ins. Co.* 65 N. Y. 6. 1875.

§ 6. An appellate court has no right to enter into deliberations of a jury and make their reasons or their methods a ground of objection if they have reached a substantially just result as to amount. *Bayly v. Lond. and Lanc. Ins. Co.* 4 Ins. L. J. 503. 1875. U. S. Circuit, La.

§ 7. If there is a dispute as to the meaning of certain terms, the question is proper to be submitted to the jury,

and upon their finding the proper legal interpretation will then be given to it by the court; otherwise, it is the duty of the court to place the proper construction upon all written documents. *Billington v. Canadian Mutual Fire Ins. Co.* 39 Up. Can. Q. B. 433. 1876.

§ 8. A question of fraud in obtaining insurance money on untrue proofs should be determined by the jury. *Hurd v. St. Paul Ins. Co.* 39 Mich. 443. 1877.

§ 9. Whether assured has used due exertions to save property insured or not is a proper question to be determined by a jury. *Dean v. Western Assur. Co.* 41 Up. Can. Q. B. 553. 1877.

§ 10. When the award of arbitrators is a nullity, it should be removed from consideration by a jury. *Parsons v. Citizens' Ins. Co.* 43 Up. Can. Q. B. 261. 1878.

§ 11. If jury in their verdict have not given the company credit for net proceeds of the property saved, verdict will be set aside. *McLeod v. Citizens' Ins. Co.* 3 Russel & C. N. S. 156. 1878.

§ 12. When the facts are indisputable, the question of materiality becomes one of law to be decided by the court. *Ryan v. Springfield Fire Ins. Co.* 46 Wis. 671. 1879.

§ 13. If there is a single change, such as a new use of the buildings or an alteration in them, jury is to say whether upon the whole the risk is increased. If there are two or more changes unconnected with each other, and one has increased the risk, it is no answer to the plea of forfeiture to say that something else has diminished it. Within this rule it is proper for jury to inquire whether stopping a mill is, upon the whole, considering the decrease of risk from accidental fires and the increase from discharge of watchman and want of power for a force pump, such a change in the use and occupation of the premises as to increase the risk. *Albion Lead Works v. Williamsburg City Ins. Co.* 9 Ins. L. J. 435. 1880. U. S. Circuit Court, Mass.

§ 14. The question as to whether agent of company who issued policy was agent of assured for purpose of cancellation is proper to be determined by a jury. Roger Williams' Ins. Co. v. Carrington, 9 Ins. L. J. 577. 1880. Mich.

§ 15. It is difficult to say as matter of law that "flax" is not included in the term "grain," and question is one for jury to determine. When policy covers "grain in stacks," &c., parties must be presumed to have intended to include by the term "grain" flax in stack. Hewitt v. Watertown Fire Ins. Co. 10 Ins. L. J. 375. 1880. Iowa.

§ 16. If parties to an insurance contract have a different understanding of an oral contract, after it is reduced to writing and executed, both are bound in equity and at law by the terms of the written contract, and it must be construed by the court. German American Ins. Co. v. Davis, 10 Ins. L. J. 670. 1881. Mass.

§ 17. When there is a dispute between the agent who filled in the application and made the diagram and the assured, as to whether the latter actually stated the distance of an exposure as represented by the agent in the diagram, question of misrepresentation as affecting or increasing the risk should be submitted to the jury. Pottsville Mutual Ins. Co. v. Meckes, 10 Ins. L. J. 717. 1881. Pa.

See Adjustment, § 12. Agent, 39, 56. Alienation, 11. Application, 15. Books of Account, 5. Cancellation, 7, 24. Certificate, 9. Contract, 1, 9. Construction, 8. Damages, 1. Encumbrance, 1. Evidence, 8, 34, 40, 71, 81, 85, 89. Foreign Company, 7. Fraud and False Swearing, 15. Goods in Trust, 10. Illegality of Contract, 4. Increase of Risk, 6, 8, 11, 12, 28. Mutual Company, 28, 86, 102, 116. Notice of Loss, 7, 10, 22. Other Insurance, 37. Overvaluation, 1, 10. Pleading and Practice, 20. Premium, 10. Proofs, 19, 23, 27, 32, 43, 44, 69, 84. Rebuild, 7. Reformation, 16. Storing and Keeping, 4, 11, 17, 21, 23. Title, 52. Use and Occupation, 8. Vacant and Unoccupied, 10, 20, 21, 32, 34, 42, 43. Waiver, 17. Warranty and Representation, 4, 15, 45, 69, 101, 108. Watchman, 6. What Property Covered, 20, 29.

## REBUILD OR REPLACE.

§ 1. When company has exercised its option to rebuild, an injunction cannot be sustained at the instance of the assured restraining the company from thus rebuilding, notwithstanding the company proceeds without obtaining any plans of the building described, and, contrary to the objection of the assured, have varied what was the known plans of the old building. Home District Ins. Co. v. Thompson, 1 Grant Err. & App. 247. 1847.

§ 2. Exercise of option to rebuild converts contract of insurance into a building contract. Beals v. Home Ins. Co. 2 Tr. App. 25. 1867.

§ 3. The election to restore or repair must be made within the prescribed time, which cannot be extended by failure or neglect of local agent upon whom proofs were served, to forward them to the company or its general agent. Delivery of proofs to local agent is delivery to company. Ins. Co. of N. A. v. Hope, 58 Ill. 75. 1871.

§ 4. Company had notified assured of its election to rebuild, but neglecting to do so action was brought. Contract provided that sum expended in rebuilding should not exceed amount insured. Jury were charged that "the company was bound to rebuild the building destroyed, *cost what it may.*" Held, error. Further, that if company neglected to proceed within reasonable time after notice to rebuild, assured might disregard it and sue upon the policy, and, with proper averments, recover the amount of the policy and interest, and the rental value of the ground during time of delay caused by act of the company. Home Mut. Ins. Co. v. Garfield, 60 Ill. 124. 1871.

§ 5. An election to repair with knowledge of the facts operates as a waiver of condition requiring statement of title in policy. Am. Cent. Ins. Co. v. McLanathan, 11 Kans. 533. 1873.

§ 6. Company having elected to repair and finally declining to do so is liable to damages caused by the delay. It must pay what it would cost to make repairs at time of refusal. *Am. Cent. Ins. Co. v. McLanathan*, 11 Kans. 533. 1873.

§ 7. The facts that assured is present while company is rebuilding and makes no complaint or suggestions, although requested to do so, and points out no objections when work is finished, are proper to be considered by jury as evidence of no defects. Court charged jury that "it was not duty of plaintiff to superintend or make suggestions. When defendant undertook to repair it did so at its own risk and peril." *Held*, error, as it naturally led jury to discard above facts as not being entitled to any consideration. *St. Paul F. & M. Ins. Co. v. Johnson*, 77 Ill. 598. 1875.

§ 8. Where company elects to rebuild, there can be no claim for rent during the time necessarily taken for that purpose; there is no foundation for such claim until, at least, after a reasonable length of time has elapsed. *St. Paul F. & M. Ins. Co. v. Johnson*, 77 Ill. 598. 1875.

§ 9. A rebuilding of property by a third party does not release the insurance company from the obligation under its policy. *People's Ins. Co. v. Straehle*, 2 Cin. Supr. Ct. 186. 1878.

§ 10. When replacement is not a condition of the contract as originally written, company cannot by a subsequent amendment of its by-laws acquire such right. *Bradfield v. Union Mutual Ins. Co.* 10 Ius. L. J. 550. 1881. Common Pleas, Pa.

See *Garnishment*, § 3. *Mortgagor and Mortgagee*, 31, 32, 48. *Proofs of Loss*, 44.

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## RECOVERY BACK OF LOSSES PAID.

§ 1. Company after payment of the loss ascertained that the assured had made a false representation as to his being the owner of the property, when it was in fact owned by his father. Assured being threatened with prosecution and arrest for obtaining the money paid to him, in order to avoid it gave his note to the company for the amount which had been paid, \$700. Company having brought action upon the note and the policy not being produced in evidence, and it not being shown that company was entitled to recover back the money paid, the case was reduced to simply one of a note given for no other consideration than to avoid prosecution for criminal misdemeanors, and that plaintiffs could not recover. Canada Farmers' Ins. Co. v. Watson, 25 Up. Can. C. P. 1. 1875.

§ 2. A compromise settlement cannot be impeached by reason of facts indicating fraud subsequently discovered. British America Ins. Co. v. Wilkinson, 23 Grant Ch. 151. 1876. *Contra*, Queen Ins. Co. v. Devinney, 25 Grant Ch. 394; 1878; where it was subsequently discovered that the assured had intentionally caused the fire.

§ 3. If assured is guilty of a fraud after the fire in connection with his claim for a loss which the company pays, upon its discovery the latter may maintain an action in assumpsit for money had and received to recover amount so paid. In such case it is not necessary to entitle company to sue that it should first return or offer to return to the assured the customary receipt and voucher given by him on receipt of the insurance money. Johnson v. Continental Ins. Co. 39 Mich. 33. 1877.

See Questions for Court and Jury, § 8.

## REFORMATION OF POLICY.

§ 1. Court should not reform a policy by indorsing permission for other insurance without clear and satisfactory proof of an agreement so to do. *Fellowes v. Madison Ins. Co.* 2 Disney, Cin. Supr. Ct. 128. 1858.

§ 2. A policy issued for a greater length of time than intended by the parties may be reformed and canceled in equity after a loss, in a suit by the company. *North American Ins. Co. v. Whipple*, 2 Biss. 418. 1871.

§ 3. When the policy does not contain the true contract between the parties and assured depends upon knowledge of company's agent to alter its terms, suit cannot be maintained upon it in an action at law, and a remedy is to be obtained by a reformation in equity. *Crawford v. Western Ins. Co.* 23 Up. Can. C. P. 365. 1873.

§ 4. The fact that a suit to reform a policy of insurance is not brought until after a loss is a circumstance that should be taken into consideration by a trial court in weighing the testimony and determining whether a mistake was made. *Van Tuyl v. Westchester Fire Ins. Co.* 55 N. Y. 657. 1873. *Aff'g* 67 Barb. 72.

§ 5. The mistake which will warrant a court of equity to reform a contract in writing must be one made by both parties to the agreement, so that the intentions of neither are expressed in it; or it must be the mistake of one party by which his intentions have failed of correct expression, and there must be fraud in the other party in taking advantage of the mistake and obtaining a contract with the knowledge that the one dealing with him is in error in regard to what are its terms. *Bryce v. Lorillard Fire Ins. Co.* 55 N. Y. 240. 1873. *s. p. Maher v. Hibernia Ins. Co.* 67 N. Y. 290. 1876.

§ 6. Assured cannot sustain an action for reformation after he has failed in an action at law upon the policy as

written. Washburn v. Great Western Ins. Co. 4 Ins. L. J. 112. 1873. Mass. s. p. Steinbach v. Relief Ins. Co. 77 N. Y. 498. 1879.

§ 7. Court cannot make a contract which was not in fact made, even where failure to make insurance which assured desired, is owing to company's misapprehension of the application. Mead v. Westchester Fire Ins. Co. 64 N. Y. 453. 1876.

§ 8. An action may be brought for reformation of policy, and for a recovery upon it as reformed, at the same time, and *it seems* it is not irregular to try such action before a judge and jury, and it is immaterial that judgment is for amount of loss only, without in express terms decreeing reformation. Maher v. Hibernia Ins. Co. 67 N. Y. 283, 292. 1876. s. p. Ben Franklin Ins. Co. v. Gillett, 9 Ins. L. J. 774. 1880. Md.

§ 9. To justify reformation of a policy, the proof that *both* parties agreed to something different from what is expressed should be so clear and convincing as to leave no room for doubt. Mead v. Westchester Fire Ins. Co. 64 N. Y. 453. 1876. s. p. Dean v. Equitable Fire Ins. Co. 8 Ins. L. J. 773. 1878. U. S. Circuit, Mass. German American Ins. Co. v. Davis, 10 Ins. L. J. 670. 1881. Mass. Miaghan v. Hartford Ins. Co. 12 Hun, 321. 1877.

§ 10. A company can have no relief in equity after a loss, in respect to those matters which by law afford a complete defense in an action upon the policy. Imperial Fire Ins. Co. v. Gunning, 81 Ill. 236. 1876.

§ 11. If the application be prepared by agent of the company, and he misdescribes the premises with full knowledge of their actual condition, and there be no fraud or collusion between the agent and the insured, the contract of insurance may be reformed in equity and made to conform to the condition of the premises as they were known to the agent. But, in an action at law, the rights of the parties must be determined by the contract as made, which cannot be altered or modified by extrinsic evidence

of a different agreement, to be established from a knowledge of the company or its agents. When the company defends on the ground of a breach of warranty, it is no answer that it knew that such warranty was not in fact true. *Franklin Fire Ins. Co. v. Martin*, 11 Vroom, N. J. L. R. 568. 1878.

§ 12. Where there has been an innocent omission or misstatement of a material stipulation contrary to the intention of both parties, equity will reform the contract. *Ins. Co. v. Lewis*, 48 Tex. 622. 1878. *Texas Ins. Co. v. Stone*, 49 Tex. 4. 1878.

§ 13. Policy containing a mutual mistake in description will be reformed in equity. *Home Ins. Co. v. Myer*, 93 Ill. 271. 1879.

§ 14. Negligence of assured in not discovering changes in policy delivered as a renewal, and *laches* in not seeking relief, are questions which make the propriety of granting relief (reformation) in a given case discretionary. *Hay v. Star Fire Ins. Co.* 77 N. Y. 235. 1879.

§ 15. A party whose duty it is to prepare a written contract in pursuance of a previous agreement, to prepare one materially changing the terms of such previous agreement and deliver it as in accordance therewith, commits fraud which entitles other party to relief. Equity will reform a written instrument where there is mistake on one side and fraud upon the other. *Hay v. Star Fire Ins. Co.* 77 N. Y. 235. 1879.

§ 16. Prayer for reformation gives jurisdiction in equity. If policy is reformed court retains jurisdiction for the determination of all issues which may be made upon it; and issues of fact will, if required, be tried by a jury. *Hammel v. Queen Ins. Co.* 50 Wis. 240. 1880.

§ 17. By agreement between local agent of company and assured risk was to commence when premium was paid, which was on May 12, 1877. The agent subsequently made out a policy on May 14th and mailed it to the assured. The risk was made to commence from the

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day it was written, May 14th, 12 o'clock, noon. The lumber insured was destroyed by fire during the forenoon of May 14th. *Held*, that policy should be reformed to express contract actually made, and that plaintiff was entitled to recover. *Knox v. Lycoming Ins. Co.* 10 Ins. L. J. 89. 1881. Wis.

§ 18. A mutual mistake of law induced by representation of company's agent may be corrected in equity by reformation. *Sias v. Roger Williams' Ins. Co.* 10 Ins. L. J. 500. 1881. U. S. Circuit, N. H.

See Agent, § 62, 103. Description, 2. Estoppel, 25. Evidence, 68. Mortgagor and Mortgagee, 13. Other Insurance, 45. Parol Contract, 7. Pleading and Practice, 17. Proofs of Loss, 41. Questions for Court and Jury, 16. Warranty and Representation, 107.

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## RE-INSURANCE.

§ 1. The right of a re-insuring company to relief in equity, does not depend upon the fact of payment to the original assured. *Phil. Trust Ins. Co. v. Fame*, 9 Phil. Rep. 292. 1872.

§ 2. The meaning of clause in re-insurance policy, "loss if any payable at same time and *pro rata* with the insured," is that the liability of the re-insuring company is to be no greater than that of the original company; that they are not to be compelled to pay any faster, and are to have the benefit of any defense which original company would have had. Any deduction, any equity, which original company would have had against the original assured, enures to benefit of re-insuring company. The company primarily liable cannot have its claim limited by its ability to meet its own obligation. *Ex Parte Norwood*, 3 Biss. 504. 1873. See note on liability of re-insurer. *Id. s. p. Cashau v. Northwestern Nat. Ins. Co.* 5 Id. 476. 1873.

§ 3. Where an agent of a company is directed by it to cancel a policy issued by him, and he makes an application to another company for re-insurance, which is accepted, but subsequently it is agreed that latter shall issue policy directly to the assured, and does so, *Held*, that former company could not maintain an action upon ground of re-insurance; but that when claim was made against it, and the question of liability is not clear, it could purchase and take by assignment from the assured his claim against the latter after a fire. *Excelsior Fire Ins. Co. v. Royal Ins. Co.* 55 N. Y. 343. 1873.

§ 4. Original company insured to amount of \$6,000. Amount re-insured, \$2,000. Former paid \$600 in full discharge of liability. Re-insurance policy contained clause "loss, if any, payable *pro rata* at the same time and in the same manner as the re-insured company." *Held*, that the re-insuring company was bound to pay only at the same rate as the re-insured, and as the latter paid only ten cents on the dollar of its insurance, the former was only liable to pay at same rate—that is, ten cents on the amount re-insured, or \$200. *Ill. Mut. Fire Ins. Co. v. Andes Ins. Co.* 67 Ill. 362. 1873. *s. p. Norwood v. Resolute Ins. Co.* 4 Jones & Sp. 552. 1873.

§ 5. Under a contract of re-insurance, the extent of the liability of the re-insurer is not affected by the insolvency of the re-assured nor by its inability to fulfil its own contract with the original insured. *Blackstone v. Allemania Fire Ins. Co.* 56 N. Y. 104. 1874.

§ 6. Where re-insurance is for one-half the original amount, and policy contains clause as follows: "Loss, if any, payable *pro rata* at the same time with the re-insured," and loss is less than amount of original insurance, *Held*, by virtue of first part of the clause defendant not bound to pay full amount re-insured, but only such proportion of amount of loss as is in the ratio of amount of re-insurance to amount originally insured. That defendant was liable therefore for only half the loss. The latter part of the clause looks to time of payability and not to fact of payment. It fixes same period for duty of payment by re-

insurer as was fixed for payment by the re-insured. *Blackstone v. Allemania Fire Ins. Co.* 56 N. Y. 104. 1874.

§ 7. The 4th section of the Statute of 19 Geo. II, ch. 37, which has been adopted and is in force in Maryland, prohibiting re-insurance, applies exclusively to marine insurance, and does not prohibit re-insurance by fire companies. *Consol. Real Est. Co. v. Cashow*, 41 Md. 59. 1874.

§ 8. The insolvency of the original insurer in no wise affects or limits responsibility of the re-insuring company. If the original assured be paid but a small dividend, the re-insurer is still liable to pay the whole amount due under its contract to the trustee of original insurer, without deducting the dividend, and the original assured has no claim in respect of the money so paid. *Consol. Real Est. Co. v. Cashow*, 41 Md. 59. 1874.

§ 9. Under the clause in re-insurance policy "loss, if any, payable *pro rata, &c.*" the insurance being for one-half of the original amount, company is liable for only one-half of the loss. *Consol. Real Est. Co. v. Cashow*, 41 Md. 59. 1874.

§ 10. Under clause in re-insurance policy that loss is payable at same time with the re-insured it is not necessary that actual payment by the re-insured precede or accompany payment by the re-insurer. It looks to the time of payability and not to the fact of payment. It fixes the same period for the duty of payment by the re-insurer as was fixed for payment by the re-insured. *Consol. Real Est. Co. v. Cashow*, 41 Md. 59. 1874.

§ 11. Clause in re-insurance policy, that it is "subject to same risks, valuations, conditions, and mode of settlement as are or may be adopted or assumed by said (re-insured) company," dispenses with preliminary proof, and fastens the responsibility of the re-insurer to the settlement and adjustment made by the re-insured company with the original assured, as to the *amount of loss*. *Consol. Real Est. Co. v. Cashow*, 41 Md. 59. 1874.

§ 12. A re-insuring company may purchase claims under the policies re-insured by it, and in an action brought by assignee of re-insured company, may set-off the amount of such claims against its liability under the contract of re-insurance. *Hovey v. Home Ins. Co.* 3 Ins. L. J. 815. 1874. U. S. Circuit, Ohio.

§ 13. Re-insurer is bound by the result of a litigation between the original insured and the re-insured, provided he has notice of the litigation and has an opportunity to manage and control it. *Strong v. Phoenix Ins. Co.* 62 Mo. 289. 1876.

§ 14. There is no priority between the original assured and the re-insured; the liability over of the re-insured is exclusively and solely to the re-insured. *Strong v. Phoenix Ins. Co.* 62 Mo. 289. 1876. *Gantt v. American Central Ins. Co.* 68 Mo. 503. 1878.

§ 15. Where company is in fact insolvent, although unknown to its directors, it cannot re-insure a limited portion of its risks without rendering the directors personally liable to holders of policies not covered by the re-insurance, under 2 R. S. (5th ed.) 519. 1 Edm. Stat. 549, 550. And such liability is not affected by the fact that the re-insuring company is not authorized to do business in the State, it having performed the agreement on its part. *Held*, however, in such an action there should be credited and deducted from the sum paid for the re-insurance, the amount of losses company or its receiver would have been obliged to pay under the re-insured policies. *Casserly v. Manners*, 9 Hun, 695. 1877.

§ 16. A court of equity has jurisdiction to entertain and enforce a bill by assignee of a re-insured company against a re-insuring company to enforce the latter's contract, and resort may be had to equity before payment to the original insured; the loss was payable *pro rata* at such times and in such manner as the re-insured company may pay. *Held*, that the words "may pay" are equivalent to *liable to pay*. *Fame Ins. Company's Appeal*, 83 Pa. 396. 1877.

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§ 17. Re-insurance policy contained clause as follows: "subject to the same conditions and mode of settlement, payable *pro rata*, &c.;" *Held*, that the company was not entitled to notice of the loss as prescribed by condition in the original policy, but that it could take advantage of any want of compliance with the contract between the original parties; if company is entitled to notice it could not be held as a matter of law that a delay of thirty-one days is a violation of a condition requiring immediate notice, there being no evidence showing the proximity of the company to the fire or to the plaintiff. North Pennsylvania Fire Ins. Co. v. Susquehanna Mutual Fire Ins. Co. 2 Pearson, 291. 1877.

§ 18. Re-insurance policy provided as follows: "This re-insurance is subject to the same specifications, terms and conditions as policy No. 434,292 of the Northern Insurance Company which it re-assures, it being well understood that the Northern Insurance Co. do not retain any sum or risk on the property covered by this policy, but retain an amount equal at least thereto on other parts of Hamilton & Sons' Works." On the 16th of March, 1876, when the re-insurance risk commenced, the re-insured company had three policies on different portions of the Hamilton Works: that which the re-insuring company insured was for \$2,800; the other two for \$2,500 each. One of the latter expired on the 1st of November, 1876. This the re-insured company were ready to renew and sent the ordinary receipt to an agent for that purpose, but the assured not desiring to continue the insurance the receipt was returned, although not until after the fire had occurred. The re-insured company paid the whole of the \$2,800 due on the other policy for that amount, and claimed from the re-insuring company \$2,200, being the proportion of the loss falling under policy in suit, it being claimed that the re-insured company had been guilty of a breach of the above condition. *Held*, that its obvious purpose was to guard against the re-insured company from further re-insuring to an extent which would lower its interest in the premises beneath that of the re-insuring company. They were to retain their insurance to an amount

equal to that re-insured, and they did retain it to the full amount. They did not re-insure or otherwise get rid of their risk, and that there was no breach of the condition. *Canada Ins. Co. v. Northern Ins. Co.* 2 Tupper, 373. 1878.

§ 19. The re-assured is not obliged in order to maintain action against the re-insurer to show that it has paid the loss. It may at once resort to an action against the re-insurer, and to such action the re-insurer may make the same defense which the re-assured could make against the original assured, or the re-assured may await a suit by the first assured, and where it is brought give notice of it to the re-insurer, and on being subjected to damages, recover them, together with the costs and expenses of the litigation of the re-insured. *Gantt v. American Central Ins. Co.* 68 Mo. 503. 1878.

§ 20. Extent of liability of re-insurer is not contingent upon the amount paid by the re-assured, nor upon any payment whatever by him. When the loss occurs which is covered by a policy of re-insurance, the re-assured is entitled to recover from the re-insurer, not what he has paid, but all that he has become liable to pay by reason of such loss. *Gantt v. American Central Ins. Co.* 68 Mo. 503. 1878.

§ 21. If the re-insuring company has notice that the re-insured, in an action brought upon the original policy by the original assured that all inducement to a vigorous and faithful defense is destroyed by reason of the divestiture of its interest in the subject-matter of the controversy, and it does not wish to risk the issue of a trial under such circumstances as a party who is to be bound by the judgment, it has the right to bring that fact to the attention of the court, and to assume control of the litigation for the protection of its own interests. Having failed to do so, it must be considered as having acquiesced in the right of the re-insured company to make the defense, and in the absence of all testimony of any fraud or want of good faith on the part of the re-insured company or its attorneys in making its defense, it must be held bound by the

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result of the suit. *Gantt v. American Central Ins. Co.* 68 Mo. 503. 1878.

§ 22. During the term for which defendant's re-insurance policy was issued, the plaintiff indorsed upon its policy to the original assured permission to carry pressed hay, and received therefor an additional premium. Defendant knew nothing of this until after the fire. Defendant's policy contained a condition avoiding it in case of the use of the property insured for the storage of articles denominated hazardous, extra hazardous, or specially hazardous. In the class of articles denominated extra hazardous was "hay or straw pressed in bundles." *Held*, that defendant's policy was avoided by the carrying of pressed hay; and that this result followed whether the policy was regarded as a re-insurance of plaintiff's risk, because said risk was altered and increased by the permission so given, or whether the policy be regarded as if it were an insurance issued to the owners of the barge insured, because then the condition as to pressed hay was violated. *St. Nicholas Ins. Co. v. Merchants' Ins. Co.* 83 N. Y. 604. 1880.

See *Consummation of Contract*, § 14. *Proofs of Loss*, 12.

## REMOVAL OF CAUSES TO U. S. COURT.

§ 1. The appointment of an agent within this State upon whom process can be served in compliance with the statute, does not prevent removal of a cause brought against a foreign company into the United States Court. *Newhall v. Atlantic Fire Ins. Co.* 8 Phil. Rep. 106. 1871.

§ 2. The right to remove a cause into the U. S. Court is an absolute one secured by the U. S. Constitution. Such right cannot be taken away by an act of a State legislature, nor can such an act make valid an agreement to same effect. A corporation is a citizen of the State which creates it. *Home Ins. Co. v. Morse*, 20 Wallace, 445. 1874. *s. p. Doyle v. Continental Ins. Co.* 6 Ins. L. J. 177. 1876. U. S. Sup. Ct.

§ 3. A corporation created within the sovereignty of Great Britain and under the laws of that country, are presumed to be citizens or subjects of that kingdom, within the meaning of Act of Congress providing for removal of causes into U. S. Court. *Terry v. Imperial Fire Ins. Co.* 4 Ins. L. J. 824. 1875. U. S. Circuit, Kans.

§ 4. Petition for removal into U. S. Court cannot be filed after a trial in the State Court. *Whittier v. Hartford Fire Ins. Co.* 4 Ins. L. J. 622. 1875. N. H. And see note on power of State Court over removal. *Id.* 622. *s. p. Continental Ins. Co. v. Kasey*, 27 Grat. 216. 1876.

§ 5. Denial of State Court of motion to remove cause into U. S. Court does not excuse defendant from filing the necessary papers with the clerk of the U. S. Court as prescribed by the Act of Congress, 1875. The right of defendant to a removal is not dependent on the question whether the State Court does or does not make an order for the removal. *Clippinger v. Miss. Valley Ins. Co.* 5 Ins. L. J. 310. 1876. U. S. Circuit, Ohio.

§ 6. Cause must be at issue before it can be said that it can or "could be tried" under Act of Congress, 1875,

providing for removal of cases into U. S. Court. Michigan Central R. R. v. Andes Ins. Co. 6 Ins. L. J. 246. 1877. U. S. Circuit, Ohio.

§ 7. Application for removal of case into U. S. Court is in time if made before pleadings are completed, or the next term following their completion. Whitehouse v. Ins. Cos. 9 Ins. L. J. 789. 1880. U. S. Circuit, Pa.

§ 8. A subsequent judgment of State Court is not rendered absolutely void by its refusal to remove case into the U. S. Court. Until it is reversed or set aside in a proper manner by an appellate court it is valid, and will be enforced in a collateral action brought upon it. Johnson v. Brewers' Fire Ins. Co. 10 Ins. L. J. 411. 1881. Wis.

§ 9. Plaintiff society and defendant were Wisconsin corporations, and plaintiff insurance company was a New York corporation. Action was brought to recover amount of damages sustained by a fire caused by alleged wrongful act or negligence of the defendant. Insurance company paid amount of its policy to the society, and both joined in action to recover the total loss. *Held*, that cause could not be properly removed into U. S. Court under Act of 1875. First Presbyterian Society and Ins. Co. v. Goodrich Transportation Co. 10 Ins. L. J. 452. 1881. U. S. Circuit, Wis.

§ 10. The Act of 1875 providing for removal into U. S. Court requires that petition shall be filed before or at the term at which cause could be first tried. *Held*, that if a cause is not in a situation to be tried at a given term, excepting by consent of both parties, that is not the term at which it can be tried, unless that consent has been given. When, through want of a prescribed notice of trial, neither party can move the case for trial at a certain term, it cannot be tried at such term. Wheeler v. Liv., Lond. & G. Ins. Co. 10 Ins. L. J. 584. 1881. U. S. Circuit, N. H.

See Foreign Company, § 21, 22, 26.

## RENEWAL OF POLICY.

§ 1. Where property was transferred to plaintiff March 4, 1867, renewal of an existing policy in name of vendor, made March 21st, and the policy assigned to former April 15th, to which the company, by its agent, with knowledge of change of ownership, consented by an indorsement on the back, *Held*, that the renewal continued policy with all the virtue which it would have had for any purpose, if not expired, and that by consenting to the assignment, forfeiture, if any, was waived, and company agreed to become answerable to the assignee to extent of his interest, and retention of premium received for the renewal was good consideration for such an agreement. Shearman v. Niagara Fire Ins. Co. 46 N. Y. 526. 1871.

§ 2. A promise to renew by company's agent, premium being neither paid nor tendered, cannot be regarded as a contract of renewal or insurance. Croghan v. Underwriters' Agency, 53 Ga. 109. 1874.

§ 3. Where policy requires notice of "any change in the risk" upon renewal, there is no "change of risk" within meaning of policy unless risk is *increased* by change. Parker v. Arctic Fire Ins. Co. 59 N. Y. 1. 1874.

§ 4. When loss is made payable to a third party, upon the assured's failing to pay the premium for a renewal he has a right to do so, and it seems that a payment by any person accepted by the company is effective to renew the policy. Mechler v. Phoenix Ins. Co. 38 Wis. 665. 1875.

§ 5. A renewal is not the effecting of other insurance, but is a mere contract of continuance of existing insurance. Pitney v. Glen's Falls Ins. Co. 65 N. Y. 6. 1875.

§ 6. Application for renewal with statement by the agent of the company of the non-payment of the premium and the issuance by the company of the renewal receipt transmitted to his agent with a letter informing him that

it held him responsible for the premium, constitutes a contract to insure as before for one year obligatory on the company. *Planters' Ins. Co. v. Ray*, 52 Miss. 325. 1876.

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§ 7. Policy was first issued, dated Feb. 16th, 1872, for one year. At the time it was issued there was a mortgage on the premises, the existence of which was not communicated to the company. Subsequently another policy was issued to the same parties on the same terms, for one year, but made payable in case of loss to the mortgagee. This policy was issued 18th of October, 1872. The first policy was renewed February 13th, 1873, and the fire occurred April 12th, 1873. Suit being brought on the first policy and renewal, company defending upon the ground of the existence of the mortgage, *Held*, that there was evidence sufficient to warrant jury in finding that the defendant had knowledge of the outstanding mortgage at the time of the renewal of the policy and that company was liable upon the ground of estoppel. *State Ins. Co. v. Todd*, 83 Pa. 272. 1877.

§ 8. A renewal, although amounting to a new contract, in no way changes the terms and conditions of the policy except as they are continued in force. *Aurora Fire Ins. Co. v. Kranich*, 36 Mich. 289. 1877.

§ 9. A renewal by company with knowledge of facts revives and restores policy, although by reason of existence of such facts policy might have been declared to be void. *Robinson v. Pacific Fire Ins. Co.* 18 Hun, 395. 1879.

§ 10. An agreement to renew a policy implies that the terms of the existing policy are to be continued, in absence of evidence that a change was intended. *Hay v. Star Fire Ins. Co.* 77 N. Y. 235. 1879.

§ 11. Assured having sworn that agent of company had consented to removal of stock insured, a memorandum made by former upon his books purporting to be a new insurance upon the property in its new location is admissible in evidence, and, together, will sustain finding of jury

that company had agreed to insure in new location, although agent swore that the entry in his book was a mere memorandum of a proposed insurance that was never made. *Roger Williams' Ins. Co. v. Carrington*, 9 Ins. L.J. 577. 1880. Mich.

§ 12. Policy contained condition that "this insurance (the risk not being changed) may be continued by renewal, &c., but in case there shall have been any change in the risk not made known to the company by the assured, at the time of renewal, this policy and renewal shall be void." Court was requested to charge the jury "that if there was any change in the risk, increasing the hazard, after issue of policy and before renewal was delivered, whether known or not known to the assured, and not made known to the defendant at time of renewal, policy is void," which was refused. *Held*, such refusal error. *Brueck v. Phoenix Ins. Co.* 21 Hun, 542. 1880.

§ 13. There is no legal objection to a renewal of a policy being issued to one of several parties originally insured. *Lockwood v. Middlesex Mut. Ins. Co.* 47 Conn. 553. 1880.

§ 14. A judgment, which by terms of the policy avoided it, was paid prior to its expiration. A certificate of renewal was obtained which contained the following words: "Provided, always, that the original policy is in full force." Company claimed that because original policy was void at its date on account of the judgment then existing although subsequently paid, that the renewal did not take effect. *Held*, untenable; that by proper construction it was not intended to reach a case where at time of the renewal all the representations contained in the original application are true and no cause of forfeiture then existing. *Titus v. Glen's Falls Ins. Co.* 81 N.Y. 410. 1880.

See Agent, § 22. Alteration, 3. Assignment, 16. Estoppel, 5. Increase of Risk, 26. Interest in Policy, 6, 25. Mortgagor and Mortgagee, 26. Parol Contract, 19. Pleading and Practice, 32. Premium, 13. Waiver, 2, 21, 45. Warranty and Representation, 96.

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## REPAIRS.

§ 1. Policy provided that "the working of carpenters, roofers, tinsmiths, gasfitters, plumbers, or other mechanics, in building, altering, or repairing the premises without permission indorsed, should vitiate it." Testimony was that accused always kept a crew of men and a carpenter or two about the building (an ice house) the year round, and was constantly making repairs and keeping the building in thorough condition. *Held*, that the clause did not refer to the casual repairing established by testimony but as prohibiting such hazardous use which arises from placing building in possession or under the control of workmen for rebuilding, alteration, or repairs; that the company from the size, structure, and use of the building must have contemplated the necessity for such repairs as described in testimony. Franklin Fire Ins. Co. v. Chicago Ice Co. 36 Md. 102. 1872.

§ 2. Policy provided "that the working of carpenters, roofers, tinsmiths, gasfitters, plumbers, or other mechanics, in building, altering, or repairing the premises, named in the policy, will vitiate the same, except in dwelling-houses, where five days are allowed, without notice, in any one year, for incidental repairs." Property insured was a woollen mill. The work done was taking out of an old boiler and the putting in a new one, and completed some months before the fire. *Held*, that the policy was not thereby avoided; that the condition does not prohibit ordinary repairs, nor such as become indispensably necessary to remedy defects on the premises, which endanger safety of property, and which occur without fault of assured, provided it appears that neither the repairs made nor the work done increased the risk, and that the fire is in no respect attributable to either. James v. Lycoming Ins. Co. 4 Cliff. 272. 1874.

§ 3. Assured had procured a permit for carpenters' and mechanics' risk for two months, during which extensive repairs had been made, which work had ceased at ex-

piration of limited time. Two weeks thereafter carpenters commenced work by putting new siding on outside of building in place of the old. This work had progressed three days when fire occurred. Policy permitted five days "incidental repairs without notice or indorsement." *Held*, that the work done was covered by the term "incidental repairs," and there was no forfeiture. *Rann v. Home Ins. Co.* 59 N. Y. 387. 1874.

See Interest in Policy, § 6. Use and Occupation, 16.

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## RISK.

§ 1. A loss caused by a freshet is not within the terms of an insurance against loss caused by fire or storm. *Stover v. Ins. Co.* 3 Phil. Rep. 38. 1858.

§ 2. When locality is specified policy cannot be extended to cover in an adjoining building; nor can the contract be changed on the ground of mistake, company supposing property to be located in place specified; nor upon the assumption that the risk would have been taken had the facts been known. *Severance v. Continental Ins. Co.* 5 Biss. 156. 1880.

§ 3. A policy issued to a railroad company contained the following: "provided all the property hereby insured is on the premises owned or occupied by the Providence and Worcester Railroad Co., in Mass. and R. I." *Held*, to render company liable, that the property must be at the time of the loss upon the premises owned or occupied by the plaintiff at the date of the contract of insurance. *Providence & Worcester R. R. Co. v. Yonkers Fire Ins. Co.* 10 R. I. 74. 1871.

§ 4. A horse owned by a farmer and killed by lightning *six miles* away from place specified in policy, is cov-

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§ 5. The terms "contained in" a particular building limit the risk to the time the goods remained in the same building in which they were when policy was issued. *Maryland Fire Ins. Co. v. Gusdorf*, 43 Md. 506. 1875.

§ 6. Under an open policy express assent of company to the several risks is not requisite where it is shown to be waived by usual course of conduct in regard to previous shipments of goods covered by the same policy. When assured gives notice on a particular occasion, as he had done on all previous occasions, and the company assents by its silence as it had always theretofore done, the latter is bound. *Edwards v. Mississippi Valley Ins. Co.* 1 Mo. App. 192. 1876.

§ 7. Policy insured the steamship "Indian Empire," lying in the Victoria Docks, London, with liberty to go into dry-dock. The vessel was taken to a dry-dock and after being repaired was towed down the river, and instead of being put into the Victoria Docks was moored outside in the river some 600 or 700 yards distant, for purpose of having paddle wheels refitted. While here the vessel was destroyed by fire. *Held*, not covered by the policy. *Pearson v. Commercial Union Ins. Co.* L. R. 1 App. Cas. 498. 1876.

§ 8. Property insured was a phæton, and was destroyed while in a shop, where it had been left for repair. It was described in policy as contained in a barn located on assured's premises. *Held*, company liable for the loss; that while the words "contained in barn" are words relating to the risk and constitute a warranty that carriage would continue to be contained in the barn, they mean only that the barn described was its place of deposit when not absent therefrom for temporary purposes incident to ordinary use and enjoyment of the property. Presumption is that policy was issued with reference to such use. *McCluer v. Girard Ins. Co.* 43 Iowa, 349. 1876. s. p. *Wearing Apparel.* *Lonqueville v. West. Ass. Co.* 51 Id. 553.

§ 9. Policy contained clause excepting loss occasioned by means of invasion of military or usurped power. Property insured was situated in a place held by troops of the U. S. Being attacked by rebel forces, during the progress of the battle, the officer in command of U. S. forces directed that a certain building should be fired, to prevent its falling into the hands of the enemy, which was done. The fire thus started, after destroying several intermediate buildings, burnt the one insured. *Held*, that the invasion was the cause of the loss, and that it was excepted by terms of the policy. *Ins. Co. v. Boon*, 5 Otto, 117. 1877. *Rev'g 12 Blatch. 24. 1874.*

§ 10. Policy insured barge while "running on the Hudson and East rivers." *Held*, that risk was not restricted to barge while in motion. That the term "running" included all that would ordinarily be comprehended by the business of a vessel in active employment. Hence barge was also insured while lying at wharf for purpose of receiving and discharging its cargo. *St. Nicholas Ins. Co. v. Merchants' Ins. Co.* 11 Hun, 108. 1877.

§ 11. Policy covering agricultural machines in a specified place is not rendered void by their temporary removal notwithstanding clause that insurance should cease in case of removal. The proper construction is that the insurance ceases while they are removed, but re-attaches on their return. *German v. Hand-in-Hand Ins. Co.* Irish Rep. 11 C. L. 224. 1877.

§ 12. Statement in policy that a threshing machine is "stored in barn," &c., is a mere matter of description operating simply to locate the machine. It does not amount to a promissory stipulation on the part of the insured or a condition of insurance on part of the insurer that this location should remain unchanged, or if changed that while changed the insurance should cease or be suspended. Machine was destroyed while standing in the field where it had been in use continuously. *Everette v. Continental Ins. Co.* 21 Minn. 70. 1874. *Holbrook v. St. Paul Ins. Co.* 25 Minn. 229. 1878.

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§ 13. Policies of insurance, unless the language excludes the presumption, must be presumed to be made with reference to the character of the property insured and the owner's use of it in the ordinary way, and for the purposes for which such property is ordinarily held and used. The company assumes all the risk from fire incident to such use and not merely that incident to the property during a part of the time or while it may be kept in a particular place. In this case the mules insured were used in cultivating a particular farm. *Held*, that the policy covered them while so used and notwithstanding the risk might be at times greater in such use than while they might be stabled in the barn; that the condition against increased risk refers to an increase beyond that which the company assumes, to wit: that ordinarily incident to the use of mules in the cultivation of the farm. *Holbrook v. St. Paul Ins. Co.* 25 Minn. 229. 1878.

§ 14. Insurance was upon a vessel against loss or damage by fire. A fire being discovered in order to save the vessel it was found necessary to submerge it. Assured claimed to be entitled to recover amount damage to cargo under principle of general average in marine insurance. *Held*, not tenable; that defendant was liable only for damage to the vessel itself. *MERCHANTS' AND MINERS' TRANSPORT CO. v. ASSOC. FIREMEN'S INS. CO.* 53 Md. 448. 1879.

§ 15. In case of an insurance upon a boat lying in winter quarters, jury may properly find that the use of a stove is reasonably included in the term "refitting risk in the spring," which risk was covered by the terms of the policy. *Lyon v. Stadacona Ins. Co.* 44 Up. Can. Q. B. 472. 1879.

§ 16. A vessel which has been intentionally run upon the beach, and holes opened permitting the water to run in and out of her hull with the tide; and fastened by a piece of railroad iron at the bow and an anchor at the stern, in which situation she had been for several months previous to the fire, cannot be considered as "lying at anchor." *Reid v. Lancaster Fire Ins. Co.* 19 Hun, 284. 1879.

§ 17. Company was exempted from liability in case of any loss by fire which might happen by means of any invasion, insurrection, riot or civil commotion, or any military or usurped power. The insured property and large amounts of other property was destroyed by fire started by and under the orders of officers of the United States government. At that time the ordinance of secession had passed the Virginia legislature, but had not been submitted to the people for ratification. *Held*, that the ordinance of secession being then inoperative, Virginia could not be regarded as a foreign state or country so as to make the act of the United States troops an invasion on the part of the United States, and that hence the loss was not within the exception. *Portsmouth Ins. Co. v. Reynolds*, 32 Grat. 613. 1880.

§ 18. When the insurance is upon a stock of goods, their removal without consent, from their place of deposit specified in the policy, terminates the insurance. *Harris v. Royal Canadian Ins. Co.* 53 Iowa, 236. 1880.

§ 19. Evidence showed that eight or ten men exchanged shots with the watchmen, set fire to the coal breaker, and drove off the watchmen. *Held*, to be a "riot" within meaning of clause in policy exempting company from liability in such case. *Lycoming Fire Ins. Co. v. Schwenk*, 10 Ins. L. J. 13. 1880. Pa.

§ 20. Policy on boat contained the following: "Also warranted to be securely moored in a safe place, satisfactory to this company, between noon of December 10 and noon April 1st following, and the company to be duly notified of the time and place of laying up. Privilege to lighter in New York harbor during the winter." The boat was not used for lightering during the winter, but was laid up at a place about twenty miles from New York, where she was destroyed by fire. No notice of laying up was given to the company. It was contended that the privilege to "lighter in New York harbor during the winter" wholly dispensed with the warranty and justified plaintiff in omitting to notify company of time and place of mooring the boat. *Held*, that such contention could

not be maintained. *Devens v. Mechanics' and Traders' Ins. Co.* 83 N. Y. 168. 1880.

§ 21. Policy insured "frame, shingle roof, hop house, while drying hops," and there was the usual clause to effect that company agreed to make good to the assured all loss or damage which should happen "by fire to the property so specified" from the 15th day of August to the 15th day of October, 1875. Fire occurred before term expired, but assured had ceased drying hops. *Held*, that defendant was not liable, and that it was not error to dismiss plaintiff's complaint. *Langworthy v. Oswego Ins. Co.* 10 Ins. L. J. 546. 1881. N. Y.

§ 22. When all the elements of a sufficient parol contract of insurance, by both a fire and marine insurance company, are shown to exist, excepting the risk, it may be inferred from the situation and circumstances of the property that the insurance was against fire. *Baile v. St. Joseph Fire and Marine Ins. Co.* 10 Ins. L. J. 657. 1881. Mo.

§ 23. A boat insured as "running on the Hudson river" in August and September, 1876, ran very little if at all. In October, about the 12th, she began to run in place of another boat taken off for repairs, and ran for a few days, and then was taken off. While tied up and not in actual use she was ready for service with water in her boiler and wood in her furnace ready to run. *Held*, that the boat, within the meaning of the policy, was running on the Hudson river, "and that no defense was available on the ground of increase of risk when she was tied up, there being no evidence to that effect." *Mark v. National Fire Ins. Co.* 24 Hun, 565. 1881.

§ 24. Policy insured household furniture, "All contained in house — McMillan street, Providence, R. I." At the time of the fire the articles had been removed and were in another house, and company had never received any notice of such removal. *Held*, that the above words in quotation marks were merely a description of the property insured, and were not a warranty that the goods

should remain in the house, and that the liability of the company was limited to a loss from a fire at that house, and that if company wished to so limit its risk, the policy should have provided that goods should not be removed without their consent. *Lyons v. Washington Ins. Co.* 12 Rep. 414. 1881. R. I.

See Assignment, § 14. Burning by Design, 4. Collision, 1, 2. Estoppel, 5, 15. Evidence, 63. Explosion, 2. Increase of Risk, 2, 27. Renewal, 11. Storing and Keeping, 3, 14, 15. Usage or Custom, 6. Use and Occupation, 7, 13. Vacant or Unoccupied, 4. Warranty and Representation, 12, 13, 43. What Property Covered, 4, 16, 21.

### STORING OR KEEPING.

§ 1. In an action upon a policy which expressly declares that only goods not hazardous and hazardous are insured, and that the keeping of extra hazardous or specially hazardous goods on the premises shall avoid the policy, *Held*, that evidence offered by assured that application was for a policy upon stock "such as is usually kept in country stores," in response to which policy in suit was sent, was properly rejected, because, if established, it could not have sustained a finding by jury that policy sent was intended as a compliance with the request. *Pindar v. Resolute Fire Ins. Co.* 47 N. Y. 114. 1871.

§ 2. Policy contained following provision: "Or if gunpowder, phosphorus, saltpetre, naphtha, benzine, benzine varnish, benzole, petroleum, or crude earth oils, are kept on the premises, or if camphene, burning fluid, refined coal or earth oils, are kept for sale, stored, or used on the premises, in quantities exceeding one barrel at any one time," without written consent indorsed, it should be void. *Held*, that the words, "in quantities exceeding one barrel," were applicable alike to *all* the articles enumerated in above provision. *Phoenix Ins. Co. v. Slaughter*, 1 Ins. L. J. 666. 1871. U. S. Sup. Court.

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§ 3. Where policy was upon "stock of fancy goods, toys, and other articles in his (assured's) *line of business*, as a German jobber and importer, with privilege to keep fire-crackers," and fireworks, belonging to a prohibited class, were kept by which the fire and loss were caused, *Held*, that the evidence tending to show that the keeping of fireworks was in *line of assured's business*, company was liable, and the verdict conclusive; and it was not error for court to refuse to charge that jury might consider rate of premium paid as bearing upon question whether fireworks were intended to be insured or not. Steinbach v. La Fayette Ins. Co. 54 N. Y. 90. 1873.

§ 4. The fact that a condition against "keeping and storing" does not prohibit a certain article, does not prevent its coming within the operation of a clause against "increase of risk." The latter is a question of fact, and if found affirmatively renders policy void. Williams v. People's Fire Ins. Co. 57 N. Y. 274. 1874.

§ 5. When a policy is issued upon a stock of goods in a specified business the underwriter is presumed to know what goods are usually kept by those engaged in that business. Hall v. Ins. Co. of N. A. 58 N. Y. 294. 1874.

§ 6. Where policy covered "materials used in their (assureds') business," *Held*, the use of such materials as were necessarily and ordinarily used in the business was authorized, although by printed clauses of policy the keeping or use of such materials upon the premises was prohibited. And this is not affected by the fact that other materials to accomplish same purpose might be used. Hall v. Ins. Co. of N. A. 58 N. Y. 292. 1874.

§ 7. Policy contained provision that petroleum, rock and earth oils, &c., should not be stored or used without written permission, and also that "camphene, spirit gas or burning fluid, phosgene or any other inflammable liquid when used in manufactories as a light," required permission by indorsement. Property was paper mill, lighted by kerosene, and at time of fire there were in mill

about forty gallons, a reasonable quantity for use for which it was provided. *Held*, that the kerosene was not "stored" within meaning of policy; that it came properly within the term "rock or earth oil," but that as policy must have been made in reference to well-known fact that kerosene is reasonably safe and in ordinary and general use for lighting purposes, and was not specially prohibited, considering the clauses together, kerosene for lighting was not prohibited, it being proved that it was not properly classified as an "inflammable liquid." *Buchanan v. Exchange Fire Ins. Co.* 61 N. Y. 26. 1874.

§ 8. Plaintiff kept crude petroleum in a jug upon a shelf in his room, for use as a medicine, and several quarts were in building at time of fire. Policy contained usual provisions against "storing and keeping" such articles. *Held*, the words "storing or keeping" were obviously aimed at storing or keeping in a mercantile sense, in considerable quantities, with a view to commercial traffic. They could not be construed to forbid the use of the petroleum as a medicine. *Williams v. Firemen's Fund Ins. Co.* 54 N. Y. 569. 1874.

§ 9. Policy contained usual clause against "storing or keeping" of certain prohibited articles. Pleadings presented no issue upon it, but set up defense of fraud in origin of fire and in the proofs of loss. Evidence was given without objection establishing presence on premises of a prohibited article. Motion for nonsuit upon ground that under above clause policy was void, which was denied. *Held*, evidence proper under issue as to fraud and its reception without objection did not waive right to object to the consideration of new issue so presented. *Williams v. Mechanics' and Traders' Ins. Co.* 54 N. Y. 577. 1874.

§ 10. Keeping a small quantity of saltpetre for purpose of preserving meat, &c., is not a "storing" within meaning of the policy. *Bayly v. Lancashire Ins. Co.* 4 Ins. L. J. 503. 1875. U. S. Circuit, La.

§ 11. To avoid policy on ground of storing or selling saltpetre there must be such a *quantity* as in the fair con-

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struction of the policy and interest of the parties would fall within the prohibition and amount to a *substantial* violation. It cannot be said that the storing of saltpetre in any quantity, however minute, voids the insurance. The question is proper to be submitted to the jury with such instruction, and their verdict is conclusive. *Bayly v. Lond. and Lanc. Ins. Co.* 4 Ins. L. J. 503. 1875. U. S. Circuit, La.

§ 12. When policy provides that no gasoline shall be stored on the premises, the word *premises* must be construed to mean the building and does not prevent the assured from storing gasoline on his lot outside of the building in reasonable quantities for use therein. *Northwestern Mutual Life Ins. Co. v. Germania Fire Ins. Co.* 40 Wis. 446. 1876.

§ 13. Policy provided that if petroleum should be kept or had upon the premises, that it should be void. The insurance was upon a stock of merchandise, and at the time of the fire assured kept a barrel of petroleum in stock for sale. *Held*, that petroleum, even although usually kept as a part of the usual stock, it could not be included in the word "merchandise," and that the insurance was avoided; and *held* also, that the force of the condition could not be affected by knowledge of company's agent. *Birmingham Fire Ins. Co. v. Kroegher*, 83 Pa. 64. 1876.

§ 14. When keeping of gunpowder is prohibited without written consent, it is not covered or permitted by the phrase "stock usually kept for sale in a country store." *Cobb v. Ins. Co.* N. A. 17 Kans. 492. 1877.

§ 15. Policy covered "drugs and medicines." Saltpetre was on hand as part of the stock of drugs at the time policy issued. It was usually kept in drug stores and was always on hand in small quantities for retail as a drug. *Held*, that the saltpetre was insured as part of the stock, and although specially prohibited in the printed terms, it did not avoid the policy. *Collins v. Ins. Co.* 79 N. C. 280. 1878.

§ 16. Policy provided that if the assured should "keep or use camphene, spirit gas, or any burning fluid or chemical oils," without written permission it should be void. Assured used a liquid called Danforth's burning fluid, which was supplied from a neighboring store, and kept in a ten-gallon can, but never more than five gallons were purchased at a time. It was used only for lighting purposes. There was evidence that Danforth's fluid was simply a form of coal oil, more highly refined and safer as regards explosive qualities. Policy also prohibited the keeping of petroleum, naphtha, or gasoline. *Held*, that plaintiff was not prohibited from keeping and using such fluid for lighting purposes, and that there could be no violation of the terms of the policy without proof that the fluid was in its nature like camphene or spirit gas. *Wheeler v. American Cent. Ins. Co.* 6 Mo. App. 235. 1878.

§ 17. When policy forbids the keeping of an explosive, the question as to whether alcohol is an explosive must be proved as a matter of fact; it cannot be assumed as a matter of law. *Willis v. Germania Ins. Co.* 79 N. C. 285. 1878.

§ 18. When assured is authorized to keep kerosene, standard quality, 110 degrees, the burden of proof is upon the company to show that it is not of that quality. *Willis v. Germania Ins. Co.* 79 N. C. 285. 1878.

§ 19. Prohibition against keeping and storing of oils cannot be construed to prohibit ordinary use of kerosene for lighting purposes. *Bennett v. N. B. & M. Ins. Co.* 8 Daly, 471. 1879. Aff'd, 81 N. Y. 273.

§ 20. Policy covered stock of "general merchandise all kinds usually kept in a country retail store." Policy specified that the insurance was against loss or damage as may occur by fire *except* as hereinafter provided. There was a subsequent condition that company should not be held liable, unless by special consent in writing, in case benzine or turpentine with other prohibited articles were kept or used. *Held*, that the fact that turpentine

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and benzine were usually kept as part of the stock of country stores would not prevent the last condition being operative, and if benzine and turpentine were kept and used, even although a part of the stock of country stores, company is not liable. *Lancaster Fire Ins. Co. v. Lenheim*, 89 Pa. 497. 1879.

§ 21. Policy prohibited the *keeping* or *having* upon the premises benzine, and the *keeping*, *having* or *using*, camphene, spirit gas or any burning fluid or chemical oils. A can of benzine was procured by the assured and placed and kept in a warehouse about fifty feet distant, from which it was brought on the premises and used for cleaning the machinery. *Held*, that the assured did not keep or have benzene on the premises within meaning of the policy, and that its use on the premises did not avoid the policy, because the *use* of benzine not being prohibited in terms, if prohibited at all, it must be because it is included within burning fluid or chemical oils, but that these words must be construed with what precedes them in the condition, and that under such construction the words burning fluid or chemical oils must mean only such fluids or oils as are in their nature like camphene or spirit gas, and that this was not a matter of which court would take judicial notice, but that it was a fact to be determined by the jury. *Mears v. Humboldt Ins. Co.* 9 Ins. L. J. 139. 1879. Pa.

§ 22. Policy contained condition that "if camphene, burning fluid, or refined coal or earth oils are kept for sale, stored or used on the premises without written consent, it should be void." Assured at time of issue of policy and thereafter used kerosene for lighting without consent, which fact was known to defendant's agent when policy was issued. *Held*, that while kerosene was included in the terms "Refined coal or earth oil," company was estopped by knowledge of its agent from setting up a breach of the condition. *Bennett v. N. B. and M. Ins. Co.* 81 N. Y. 273. 1880.

§ 23. When policy covers "stock of drugs and medicines and merchandise usually kept in country stores," if benzine is a drug or is usually kept in country stores, it

is covered by the insurance, notwithstanding a printed prohibition against the storing and keeping of benzine. The question as to whether benzine is a drug and whether it is usually kept in a country store should be submitted to the jury if there is any evidence legitimately in the case on either question. *Carrigan v. Lycoming Ins. Co.* 10 Ins. L. J. 606. 1881. Vt.

See *Estopell*, § 11, 34, 37. *Evidence*, 16, 71, 89. *Increase of Risk*, 8, 27. *Illegality of Contract*, 4. *Lighting*, 2, 6. *Use and Occupation*, 6, 7, 13. *Warranty and Representation*, 108.

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## SUBROGATION.

§ 1. Where property is negligently lost or destroyed in transportation, and company pays the loss to the assured, it can recover the sum so paid from the party responsible for the loss, although it was not legally bound to indemnify the assured. *Ins. Co. v. C. D. Jr.* 1 Wood. 72. 1870.

§ 2. Where, under an executory contract of sale, the vendee agrees to pay the expense of insuring, and does so, the insurance exists for his benefit, and company has no right of subrogation. *Wood v. North Western Ins. Co.* 46 N. Y. 421. 1871.

§ 3. On payment of loss, company cannot sue wrong-doer who occasioned it in its own name, either at common law or under statute of Missouri. Suit, although for use of insurer, must be in name of person whose property was destroyed. *Aetna Ins. Co. v. Hannibal & St. J. R. R.* 3 Dill. 1. 1874.

§ 4. There can be no subrogation when policy insures owner, loss, if any, payable to a mortgagee. *Cone v. Niagara Fire Ins. Co.* 60 N. Y. 619. 1875.

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§ 5. Insurance company, having paid a loss caused by sparks from an engine, it is subrogated to rights of assured as against the railroad company, and may bring suit to recover the amount paid. Such an action cannot be claimed to be local as being one to recover damages for injuries to real estate; it is personal and transitory, its *gravamen* negligence, and is hence maintainable in another State than the one where fire occurred. *Home Ins. Co. v. Penn. R. R. Co.* 11 Hun, 182. 1877.

§ 6. Building insured was burned through negligence of railroad company. Assured settled with it for a sum less than the actual damage and gave a release, in which it was stated: "This settlement is not intended to discharge the Connecticut Fire Insurance Company from any claim, &c." It was insisted that as the assured had settled and released all his claim for damages, the insurance company could take nothing by subrogation or assignment. *Held*, that as the insurance company could not have interposed the release as a defense in an action by the assured upon the policy, and the assured having released only such damages as he could without interfering with his claim against the insurance company, the legal consequence—subrogation—must be regarded as part of the exception. That insurance company acquired the claim by subrogation, and was entitled to recover. *Connecticut Fire Ins. Co. v. Erie R. R. Co.* 73 N. Y. 399. 1878. Rev'g 10 Hun, 59.

§ 7. If a loss is occasioned by the wrongful act of another, company is subrogated to the rights and remedies of the assured, and may maintain an action in its own name against the wrong-doer. If the assured receives the damages from the wrong-doer before payment by the insurer, the amount so received will be applied in discharge of the policy. If the wrong-doer pays assured after payment by the insurer, with knowledge of the facts, it is regarded as a fraud upon the insurer, and he will not be protected from liability to the latter. *Connecticut Fire Ins. Co. v. Erie R. R. Co.* 73 N. Y. 399. 1878. Rev'g 10 Hun, 59.

§ 8. *Semble* that an insurance company acquires no right by subrogation until full payment of the loss to the assured. People's Ins. Co. v. Straehle, 2 Cin. Supr. Ct. 186. 1878.

§ 9. Assured, being insolvent, after payment of his loss by an insurance company, commenced an action against a railroad company whose engines, it was alleged, caused the fire. The insurance company filed a bill in equity for an injunction restraining the settlement of such claim, and asked to be subrogated to the extent of the insurance. *Held*, that such injunction was proper, and should be continued until the case against the railroad company was finally determined. Hartford Fire Ins. v. Pennell, 2 Bradwell, 609. 1878.

§ 10. One Forbes, owner of the building in question, leased it to another by the name of Bonner, by a lease which rendered the latter bound to repair, "except damaged by fire, destruction by storm or tempest of the building or any part thereof, or destruction by foreign enemies." Forbes insured the house by a policy against fire, covering injury by explosion of gas. In 1877 the corporation of Brighton, while repairing the streets with a steam railway, owing to its great weight damaged a pipe and caused an escape of gas into the building, where it exploded and did considerable damage. Forbes sold the house and the policy to a third party, and after some negotiation the insurance company paid the latter the sum of £750. The lessee received from the corporation of Brighton the amount of damage done to the house by the explosion, and with the sum received reinstated the house. At the time the insurance company paid to the purchaser the sum of £750, they were not aware that, by the terms of the lease, the lessee was bound to make good the injuries done by an explosion of gas. The insurance company, upon learning that the building had been reinstated by the lessee, claimed from the purchaser the sum which had been paid by them, £750, and upon his refusal brought an action to recover it. *Held*, that such action would lie, and that defendant was liable; that the company, upon payment of the loss, was subrogated to all the rights of the assured as against the

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lessee, and that, when the latter did repair, the insurance company must have the benefit. *Darrell v. Tibbetts*, L. R. 5 Q. B. Div. 560. 1880.

§ 11. When a fire has occurred occasioned by negligence of a third party, and destroying property insured by several companies, the latter, by their payment of the loss, are subrogated to the rights of the assured against such third party, and may maintain an action in their own names jointly with the assured. *Swarthout v. Chicago & Northwestern R. R. Co.* 49 Wis. 625. 1880.

See *Damages*, § 2. *Evidence*, 46. *Mortgagor and Mortgagee*, 9, 16, 28, 30, 42, 46, 47. *Who May Sue*, 20.

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## TAXATION.

§ 1. An act providing for the imposition of a tax of 3 per cent. upon the amount of the premiums collected and uncollected, held, unconstitutional. *Franklin Ins. Co. v. State*, 5 W. Va. 349. 1872.

§ 2. A tax imposed by a State legislature upon a fire insurance company created by and under its laws, upon the entire premiums of the company, received from all sources, whether within or without the State, is not illegal or unconstitutional as being in violation of the Constitution of the United States prohibiting interference with or regulation of inter-State commerce. *Ins. Co. v. The Commonwealth*, 87 Pa. 173. 1878.

## THEFT.

§ 1. Condition that company shall not be liable for "loss or damage by theft at or after any fire," is binding on the insured. *Liv., L. & G. Ins. Co. v. Creighton*, 51 Ga. 95. 1874.

## TITLE.

§ 1. A tenant from year to year cannot insure as owner. *Crockford v. Lond. & Liv. Fire Ins. Co.* 5 Allen, N. B. 152. 1861.

§ 2. Policy being issued with knowledge of company, with error in name of assured, loss being made payable to third party; in a suit by the latter, *Held*, that defendant could not insist upon such error as a defense upon ground that the title was in another person than the one named as assured. *Solms v. Rutgers Fire Ins. Co.* 2 Tr. App. 227. 1867. s. c. 4 Abb. Ct. App. Dec. 279.

§ 3. Policy contained condition, "property must be insured in the names of all the owners, and applicant must state the interest of each owner, &c." It appearing that the insured property, grain, was insured in the name of the plaintiff, who had given warehouse receipts for it to several banks. *Held*, that the condition was broken, and plaintiff could not recover. *McBride v. Gore District Mut. Ins. Co.* 30 Up. Can. Q. B. 451. 1870.

§ 4. Sole and unconditional ownership is not affected by existence of a chattel mortgage. *Hubbard v. Hartford Fire Ins. Co.* 33 Iowa, 325. 1871.

§ 5. Possession and acts of ownership are *prima facie* evidence of ownership. Kansas Ins. Co. v. Berry, 8 Kans. 159. 1871. s. r. Franklin Fire Ins. Co. v. Chicago Ice Co. 36 Md. 102. 1872.

§ 6. Actual possession under a deed with a claim of the fee, raises presumption of an estate in fee. Winnesheik Ins. Co. v. Schueller, 60 Ill. 465. 1871.

§ 7. When property has been sold on judgment and execution against the assured, the time for redemption not having expired, the title of the assured cannot be said to be "entire, unconditional and sole." Reaper City Ins. Co. v. Brennan, 58 Ill. 158. 1871.

§ 8. The existence of a mortgage does not make false a representation by the assured that he held the title in fee simple. White v. Agricultural Ins. Co. 22 Up. Can. C. P. 98. 1871.

§ 9. Assured having contract to furnish wood to a railroad company was accustomed to drawing and piling it at a convenient place along their track. The company would take from the piles as wanted, giving vouchers for such portion as was removed only and paying for the same. *Held*, that the title to the wood piled, and not removed by the company, remained in the assured. Home Ins. Co. v. Heck, 65 Ill. 111. 1872.

§ 10. The fact that goods are held under a bill of sale, a lien being reserved by the vendor as security for a part of the consideration does not prevent the purchaser and assured from being the entire, unconditional and sole owner. Manhattan Ins. Co. v. Barker, 7 Heiskell, 503. 1872.

§ 11. Where a husband erects a dwelling on his wife's lot, and with her occupies it, and as her agent effects an insurance for their mutual benefit, though in his own name, and company, aware of these facts, issues the policy and receives the premium, he may recover on policy in case of loss. Am. Cent. Ins. Co. v. McLanathan, 11 Kans. 533. 1873.

§ 12. Assured holding conveyance obtained by his fraud, does not destroy his title, or insurable interest. Such a conveyance is not void, but voidable only. An insurance company cannot avoid liability by setting up fraud committed on third parties. *Phoenix Ins. Co. v. Mitchell*, 67 Ill. 43. 1873. In such a case as between the assured and his vendor the insurance money represents the property destroyed. *Id.*

§ 13. Policy required that if the interest of the insured should be less than the entire, unconditional, absolute and sole ownership, it should be so represented and expressed in the policy, otherwise, it should be void and assured was in possession under a contract of purchase, but had failed to pay the purchase-money that was past due. Furthermore, he had neglected for the three preceding years to pay the taxes, &c., and there were three outstanding certificates of sale for such unpaid taxes. *Held*, that the sole, unconditional and entire ownership of and title to the premises were not in the assured. *Hinman v. Hartford Fire Ins. Co.* 36 Wis. 159. 1874.

§ 14. An intention to form a partnership or an agreement to create one, does not create a partnership so as to prevent assured from being the sole and unconditional owner of the property. Nor does the mere fact that a person puts a certain amount of money in the business, and permits his name to be used as a partner, make such person a joint-owner of the goods used in the business, unless so understood and agreed. As between third parties, they would be partners, but not between themselves. *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230. 1874.

§ 15. When policy is issued direct to separate parties named who are together the absolute owners of the property, the fact that one has a less interest does not operate to defeat the insurance under the clause requiring representation and statement of title and interest in the policy when less than absolute ownership. Such a condition is only obligatory upon the insured when the united interest of the insured in the property is less than absolute. *Rankin v. Andes Ins. Co.* 47 Vt. 144. 1874.

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§ 16. The existence of a mortgage encumbrance unrepresented and unexpressed, does not render the policy void under condition that "if the interest of the assured be any other than the entire, unconditional, and sole ownership for use and benefit of the assured it must be so represented and expressed in the policy, otherwise, it shall be void." *Clay Fire Ins. Co. v. Beck*, 43 Md. 358. 1875.

§ 17. If the assured at the time of the issue of the policy holds only the bare legal title with an existing obligation by written contract to transfer it to a purchaser in whom is the entire equitable estate, such interest must be truly stated in the policy under the clause requiring interest to be stated if anything less than the sole absolute unconditional ownership. *Clay Ins. Co. v. Huron Man. Co.* 31 Mich. 346. 1875.

§ 18. Insured bought goods in an auction store, and left them there for sale under his direction, with an agreement that from the first proceeds of the sale, the vendor should be paid \$3,000; and if the auctioneers advanced money, they were to retain possession of goods as security. There was no evidence that such advance was made. *Held*, there was no such limitation of assured's title as owner, as required his interest to be expressed in the policy, and there was no encumbrance. *Franklin Fire Ins. Co. v. Vaughan*, 2 Otto, 516. 1875.

§ 19. Assured is not required to disclose the particulars of his title unless interrogated in respect thereto or it is made imperative upon him by a condition of the policy. *West Rockingham Fire Ins. Co. v. Sheets*, 26 Grat. 854. 1875.

§ 20. Assured who holds warehouse receipt indorsed to him as collateral security for advances may be properly and legally insured as the owner of the property. *Wilson v. Citizens' Ins. Co.* 19 L. C. Jurist, 175. 1875.

§ 21. When there is no condition in policy which relates to matters of title in such case the silence of the insured as to the precise condition of title is not a ground

of defense although interest in ownership may not be absolute in law, there is no false representation in assured representing the building insured as "my residence." The nature of his title and interest may be fully explained in such case upon trial by parol testimony. *Liv., Lond. & Globe Ins. Co. v. McGuire*, 52 Miss. 227. 1876.

§ 22. Existence of a deed of trust upon a building as security for a debt does not prevent the assured from being the sole and unconditional owner. *Manhattan Ins. Co. v. Weill*, 28 Grat. 389. 1877.

§ 23. Assured who holds property in trust for vendor until purchase-money is paid is not the sole, absolute and unconditional owner. *Farmers' Ins. Co. v. Curry*, 6 Ins. L. J. 733. 1877. Ky.

§ 24. Naked possession cannot be held to be a sole absolute ownership. *Porter v. Aetna Ins. Co.* 6 Ins. L. J. 928. 1877. U. S. Circuit, Mich.

§ 25. Policy provided that if building "should stand on leased ground it must be so represented to the company and so expressed in written part." At time of its issue there was an outstanding lease to third party for ten years. It was admitted that the plaintiff was "the owner in fee." Nothing was expressed in policy. *Held*, plaintiff entitled to recover. *Ins. Co. v. Haven*, 5 Otto, 242. 1877.

§ 26. A party cannot be the sole and unconditional owner when there exists a vendor's lien for unpaid purchase-money. *Farmers' Ins. Co. v. Curry*, 13 Bush (Ky.), 312. 1877.

§ 27. Policy provided that if the interest of the assured was other than "entire unconditional and sole ownership" it must be so expressed. At time of its issue there was an outstanding lease to third party for ten years. It was admitted on the trial that plaintiff was the "owner in fee." Nothing was expressed in the policy. *Held*, that plaintiff was entitled to recover. *Ins. Co. v. Haven*, 5 Otto, 242. 1877.

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§ 28. Policy contained usual condition that if the interest of the assured was not sole and absolute ownership, it should be so represented and expressed in the policy, otherwise it should be void. Company admitted on trial that the assured owned the fee to the land upon which building insured stood. It appeared in the proofs that the premises were subject to a lease. Company offered no evidence, and court directed a verdict for plaintiff. *Held*, no error; that the admission of ownership in fee of the land created presumption conclusive, in absence of proof to contrary, that title to the building was the same. That the existence of the lease did not prevent the assured from being the sole and absolute owner, &c. Lycoming Ins. Co. v. Haven, 7 Ins. L. J. 449. 1877. U. S. Circuit, Ill.

§ 29. It is true that assured owns a building notwithstanding the existence of a vendor's lien for unpaid purchase-money and occupies it notwithstanding that his son and son-in-law both live in the same building. Chatillon v. Canadian Mut. Fire Ins. Co. 27 Up. Can. C. P. 450. 1877.

§ 30. Company defended upon ground that the building insured was erected on land of another on which assured was a trespasser, and that facts material to the risk were concealed. It appeared that the assured entered upon the land and obtained the insurance under a reasonable and honest belief that he had title, and that he did not withhold the knowledge of a dispute about his title in bad faith. *Held*, that plaintiff was entitled to recover. Monroe County Mutual Ins. Co. v. Robinson, 7 Ins. L. J. 636. 1878. Pa.

§ 31. If assured has only a leasehold interest in the property at the time of obtaining the policy and it is not so expressed in it the insurance is void. Mers v. Franklin Ins. Co. 68 Mo. 127. 1878.

§ 32. Policy provided that "if the interest of the assured be any other than the entire, unconditional, free and unencumbered ownership of the property, and is not so expressed in written portion of policy" it should be

void. The interest of assured was subject to a mortgage, which was not stated in the policy. *Held*, that neither the assured or plaintiff, to whom loss was payable, could recover. *Fitchburg Savings Bank v. Amazon Ins. Co.* 125 Mass. 431. 1878.

§ 33. If assured was the entire, unconditional and sole owner of the property insured, for his own benefit, and had undisputed possession of it at date of policy, the fact that it was bought in the name of another in whose name title was recorded, does not vitiate the insurance, there being no question of fraud or concealment. *American Basket Co. v. Farmville Ins. Co.* 3 Hughes, 251. 1878.

§ 34. An existence of an encumbrance by mortgage makes the interest of the assured other than the entire unconditional and sole ownership. *McLeod v. Citizens' Ins. Co.* 3 Russel & C. N. S. 156. 1878.

§ 35. When a party holds an equitable interest only by contract of purchase, the title to remain in the vendor until consideration is fully paid, if insurance is obtained by the former in his own name, his interest must be truly stated, otherwise policy is void on the ground of concealment, insured being required by one of the conditions of the policy to state whether any other person had an interest in the insured property, and if so, its nature. *Agricultural Ins. Co. v. Montague*, 38 Mich. 548. 1878.

§ 36. Policy insured Van Tuyl & Co. "as interest may appear." *Held*, that these words waived a specific statement of interest required by the policy. *De Wolf v. Capital City Ins. Co.* 16 Hun, 116. 1878.

§ 37. Assured had purchased the property at an orphans' court sale, the terms of which were one-half cash and the other half in one year. After the sale was confirmed the policy in suit was obtained. *Held*, that although plaintiff's title was an equitable one it nevertheless vested in him the entire unconditional and sole ownership subject to the payment of the balance of the pur-

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chase-money, and that the insurance could not be defeated by a failure to have the exact nature of the title indorsed upon the policy; that the balance due upon the purchase was practically an encumbrance, and the company should have made inquiry in regard to encumbrances; not having done so there could be no defense founded upon the fact of its existence. *Millville Mutual Fire Ins. Co. v. Wylgus*, 88 Pa. 107. 1878. *Chandler v. Commerce Fire Ins. Co.* 88 Pa. 223. 1878.

§ 38. Policy provided that if the interest of the insured was other than absolute ownership for use and benefit of the insured it must be so represented and expressed in policy, otherwise it should be void. It appeared that by agreement with the assured, a third party was to have a certain proportion of the net profits from the sale of the property insured, in consideration of which he should give his time to the business. *Held*, that this did not prevent the ownership in the assured from being for his use and benefit; that it might also be of some advantage to another does not make the assured's ownership for the use and benefit of such party within the meaning of this clause of the policy. *Boutelle v. Worcester Fire Ins. Co.* 51 Vt. 4. 1878.

§ 39. Policy contained provisions as follows: "If the interest of the insured be any other than entire, unconditional and sole ownership for the use and benefit of the assured, or if the building insured stand on leased ground, it must be so expressed in written part, otherwise it should be void;" also, "if property be sold or transferred, or upon the passing or entry of a decree of foreclosure, or any change takes place in the title or possession \* \* \*, or if the interest of the assured, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in the policy, it shall be void." At the time the policy was obtained, assured was the owner in fee of the building insured, subject to certain mortgages and to a lease given by him, running for about three and a half years. Trial court ruled that the interest of the assured was not sufficiently expressed in the policy, and

that it was therefore void. Policy made no mention of these encumbrances. *Held*, error. Dolliver v. St. Joseph Fire Ins. Co. 128 Mass. 315. 1879.

§ 40. The fact that the wife of the assured's vendor has a contingent right of dower in the premises of the insured, does not prevent the assured from being the sole, absolute and unconditional owner. Virginia Fire Ins. Co. v. Kloeber, 31 Grat. 749. 1879.

§ 41. A bill of sale executed and delivered as security in the nature of a chattel mortgage, does not avoid a policy under the condition as to sole and unconditional ownership. Kronk v. Birmingham Ins. Co. 91 Pa. 300. 1879.

§ 42. In the absence of any specific inquiry or any special stipulation in the policy, the interest of the assured as equitable owner is sufficiently described in the policy by the words "his dwelling-house." Walsh v. Philadelphia Fire Association, 127 Mass. 383. 1879.

§ 43. Party in possession under contract of purchase, conceded to be in force, is the "owner in equity," and a statement by him in an application for insurance that he *owns* the property is not untrue, and cannot be considered as a breach of a condition, forfeiting policy, if interest of assured is any other than entire, sole, and unconditional ownership, and is not so *represented* to the company. Pelton v. Westchester Fire Ins. Co. 77 N. Y. 605. 1879. Aff'g 13 Hun, 23.

§ 44. An individual having insured in the name of the "National Slipper Co.," *Held*, that in the absence of concealment or misrepresentation about the matter there was no such misstatement of interest or title as to avoid the policy. A mere variance of name cannot prejudice where the identity of person appears. Clark v. German Mutual Fire Ins. Co. 7 Mo. App. 77. 1879.

§ 45. The existence of a lien for unpaid purchase-money does not prevent the assured from being the sole

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and absolute owner. *Woody v. Old Dominion Ins. Co.* 31 *Grat.* 362. 1879.

§ 46. Application required assured to state fully his interest, whether as owner, mortgagee, &c., to which the answer was "owner." It appeared that the assured owned sixty out of the sixty-four shares in the boat insured. *Held*, that the answer was not literally untrue, and that in the absence of fraud it was true in letter and in spirit, and plaintiff was entitled to recover. *Lyon v. Stadacona Ins. Co.* 44 *Up. Can. Q. B.* 472. 1879.

§ 47. A married woman entitled to certain property bequeathed to her by will, may properly and correctly represent herself as the owner. *Butler v. Standard Fire Ins. Co.* 26 *Grant Ch.* 341. 1879.

§ 48. The acceptance of a policy containing conditions that if interest of assured is anything but the absolute ownership, &c., it must be so stated and indorsed without any representation as to title, or any statement of the specific interest of the assured, amounts to a declaration on part of the assured that his interest is an absolute one. If assured truly states his interest to company's agent, the latter's failure to incorporate it in the policy will not avoid the insurance. *Mers v. Franklin Ins. Co.* 8 *Ins. L. J.* 505. 1879. Mo.

§ 49. Policy insured "S. D. Wood and Moore & Co., as *interest may appear*." Wood's interest was that of mortgagee. There were conditions as follows: "If interest of assured, whether as owner, trustee, agent, mortgagee, &c., or otherwise, be not stated in the policy, it should be void; also, "if interest of assured be any other than the unconditional sole ownership, &c., it must be so expressed in written part of policy, otherwise it should be void." *Held*, that interest was sufficiently stated, and that there was no breach of conditions. *Dakin v. Liverpool, London and Globe Ins. Co.* 77 N. Y. 600. 1879.

§ 50. When defense is based upon false representation or concealment in reference to title, if the policy is

made payable in case of loss to a third party as interest should appear, such a clause establishes notice to the defendant of some interest in the property insured, which, although not accurately defined, is sufficient to put defendant upon inquiry. Company, in such a case, is chargeable with notice of all such facts in relation to interest as a proper and diligent investigation would have developed. *Fame Ins. Co. v. Mann*, 4 Bradwell, 485. 1879.

§ 51. Company having issued its policy without requiring any application from the assured, or any representation of any character in relation to title or interest, cannot subsequently complain that the interest was not truly stated in the policy or that an encumbrance was not disclosed. *Western Ins. Co. v. Mason*, 5 Bradwell, 141. 1879.

§ 52. An outstanding contingent right of dower is not such an interest as shows that the assured has less than a perfect title, nor does it constitute an encumbrance. The failure on part of assured to disclose such contingent right does not affect the insurance in the absence of fraud or increase of risk, and these questions are properly determined by the jury. *Virginia F. and M. Ins. Co. v. Kloeber*, 9 Ins. L. J. 354. 1879. Va.

§ 53. Assured although in possession of building and real estate under a verbal gift and promise to convey, and has paid taxes and for improvements, &c., cannot be said to be the sole absolute and unconditional owner. *Vineyard v. Security Ins. Co.* 53 Md. 276. 1879.

§ 54. Policy required interest of assured, being other than sole owner, to be expressed in written part of policy. It insured A. upon "his property," &c., loss, if any, being made payable to B. Property was in possession of A. under a contract of purchase whereby title was to remain in B. until fully paid for. Fire occurred before such payment was made. *Held*, that policy was void by reason of interest of assured not being stated in the policy. *Lasher v. Northwestern Nat. Ins. Co.* 18 Hun, 98. 1879.

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§ 55. Court charged jury as follows: "It seems that this property was owned by Van Wie under mortgage and Mr. Simons had judgment against it and it became his duty to see that the property sold for enough to pay his debt. He procured the services of John W. Farrelly to bid in the property for him. That sheriff's deed to John W. Farrelly has been lost. It was sold by Farrelly to Robinson and by Robinson to Mrs. Simons, and from Mrs. Simons to Mr. Simons. All of which appears to have been done prior to July 17th, 1871. If there had been no deeds by Mr. Farrelly at the time, and Mr. Simons by himself, or through his agent or brother, had furnished the money to Mr. Farrelly to pay the purchase-money Mr. Farrelly would have been a trustee, Mrs. Simons would have been a *cestui qui trust* and Mr. Simons would have been an unconditional owner of the property. A man who buys property through another holds the equitable title, and the other holds a legal title. We say, if you believe that evidence, Mr. Simons was the sole, entire, and unconditional owner of this 'property.'"*Held*, no error. Watertown Fire Ins. Co. v. Simons, 9 Ins. L. J. 597. 1880.

§ 56. Condition provided that "no insurance effected shall be good and valid unless the assured has a good and perfect, unencumbered title at the time of effecting any such insurance, or unless the true title of the assured and the encumbrances, if any, be fully disclosed in the proposals for insurance and be also specified in the policy." Company claimed that true title was not stated as required by the condition by reason of the existence of a lease of the property for 5 years which was recorded. The policy contained a statement to the effect that the premises were occupied by a tenant. *Held*, that the title referred to in the condition had no reference to possession by a tenant under an ordinary lease; that the policy clearly contemplated that the premises were then occupied by a tenant; that a tenancy implied a lease and that if company wished further particulars, they should have called for some specific information. Having issued the policy without making such inquiry, they could not after the loss complain. *Semblé*, that a lease for life, or for 99 years,

might present a different question. *Lockwood v. Middlesex Mut. Ins. Co.* 47 Conn. 553. 1880.

§ 57. Policy insured "George Mark, superintendent," in fact, the property belonging to several persons, five in number, who owned certain definite shares, Mark owning fourteen-forty-eights. Mark had for several years been superintendent and had charge of the boat insured. The agent who issued the policy knew that Mark was not the owner. Policy contained the usual condition providing that if the interest of the assured was not the absolute ownership, it should be so represented and stated in the policy, otherwise, it should be void. *Held*, that the description in the policy of Mark as superintendent was a plain indication that he was not the absolute owner, and, under such circumstances, it must be assumed that the insurance was intended for the benefit of the real owners just as if the policy had been issued to a person describing him as agent. *Mark v. National Fire Ins. Co.* 24 Hun, 565, 1881.

§ 58. The existence of a lien upon an undivided half to secure a debt due from the assured, does not prevent him from being the sole, absolute, and unconditional owner. *Carrigan v. Lycoming Ins. Co.* 10 Ins. L. J. 606 1881. Vt.

§ 59. The right of a third party to an ~~an~~ conveyance upon certain conditions which have not been complied with, does not affect title of assured, and the insurance is properly in his name. *Carrigan v. Lycoming Ins. Co.* 10 Ins. L. J. 606. 1881. Vt.

§ 60. When policy is issued to two persons jointly the fact that the assured have separate and distinct interests is no ground of objection to validity of the insurance in absence of an express requirement in the policy that the precise nature and extent of the interests should be represented. *Castner v. Farmers' Mutual Ins. Co.* 10 Ins. L. J. 458. 1881. Mich.

§ 61. When assured owns an undivided half and the other half is owned by an assignee for benefit of creditors

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subject to a mortgage, he is not the sole, absolute, and unconditional owner. For the purpose of making himself such owner it is necessary that the assured should acquire or extinguish the interests of the assignee and the mortgagee, and these results although capable of being effected without writing, cannot be accomplished except by transactions containing elements necessary to make binding. A verbal arrangement without consideration is not sufficient. *Miller v. Amazon Ins. Co.* 10 Ins. L. J. 581. 1881. Mich.

§ 62. The condition in policy requiring that if the assured is not the absolute and unconditional owner, it must be so represented and expressed, refers to the extent of the insurable interest of the assured and not to the validity of his title; so long as the assured, under claim of right, has exclusive use and enjoyment of the insured property without any assertion of an adverse right or interest in it by any other person he is the owner of the property. *Miller v. Alliance Ins. Co.* 12 Rep. 4. 1881. U. S. Cir. N. Y.

See Alienation, § 7, 33. Concealment, 6, 8, 9. Encumbrance, 17. Estoppel, 18, 21, 27, 28, 37. Evidence, 11, 75. Fraud and False Swearing, 13. Insurable Interest, 7, 21, 33, 34, 45. Interest in Policy, 6. Proofs of Loss, 20. Rebuild, 5. Waiver, 15, 21. Warranty and Representation, 17, 20, 25, 28, 29, 62, 80, 82, 90, 98, 108.

## TWO-THIRDS OR THREE-FOURTHS CLAUSE.

§ 1. When in a case of loss liability is limited to two-thirds of the actual cash value of the property insured it applies to each separate item and not to the whole amount of insurance. *McCulloch v. Gore District Mut. Fire Ins. Co.* 32 Up. Can. Q. B. 610. 1872.

See Contribution, § 1, 13. Mutual Company, 37, 118.

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## USAGE AND CUSTOM.

§ 1. When the terms employed are clear and precise in themselves, evidence of usage and custom cannot be admitted to explain, alter, or impair the contract as made. *Hearn v. New England Mut. Ins. Co.* 3 Cliff, 318. 1870. *s. p. Lattomus v. Farmers' Mut. Ins. Co.* 3 Houston (Del.), 254. 1873. *King v. Enterprise Ins. Co.* 45 Ind. 44. 1873. *Van Alstyne v. Aetna Ins. Co.* 14 Hun, 360. 1878.

§ 2. Evidence of the business habits of a limited number of third persons engaged in a similar business, is incompetent to discredit testimony of plaintiff as to amount of stock on hand at time of fire. *Townsend v. Merchants' Ins. Co.* 4 Jones & Sp. 172. 1873.

§ 3. In a suit to recover value of goods stored in warehouse the custom of other companies in writing policies on goods therein is not admissible. *Hartford Fire Ins. Co. v. Farrisch*, 73 Ill. 166. 1874.

§ 4. Where there is an established custom relating to the subject-matter of a contract, which is known to both parties to it, it may be presumed that contract was made

with reference to such custom. Action was brought to recover agent's commissions. *Miller v. Ins. Co. of N. A.* 1 Abb. N. C. 470. 1876. N. Y. Sup.

§ 5. The existence of a custom at one place cannot be inferred from the practice of an agent at another. *Reynolds v. Continental Ins. Co.* 36 Mich. 131. 1877.

§ 6. It is error to exclude evidence tending to show that certain property claimed to be insured by reason of being part of business by custom, is not so insured unless special premium is paid therefor. *St. Nicholas Ins. Co. v. Merchants' Ins. Co.* 11 Hun, 108. 1877.

§ 7. In an action brought by company upon a premium note given by a captain of a boat, reliance was had upon proof of a custom at Pittsburg for captains of boats to insure and give notes for the premium, which were binding on the owners. *Held*, that a custom so long persisted in as to be known and practiced by a community is the law of the particular business in which it exists. Such a custom is presumed to be in the view of the parties when they contract. No particular period of time is requisite to the establishment of a usage so as to affect contracts. The true test is that it has existed a sufficient length of time not only to have become generally known to the dealers who are to be affected by it, but also to warrant the presumption that contracts are made in reference to such usage or custom. Nine witnesses, residents of Pittsburg, and qualified by knowledge of the business, having testified as to the existence of the custom claimed to exist, their evidence is sufficient to sustain a verdict. *Adams v. Pittsburg Ins. Co.* 10 Ins. L. J. 673. 1880. Pa.

§ 8. Upon an issue as to authority of company's agent to consent to a transfer of the property insured, evidence of a custom of other companies is inadmissible. It is doubtful whether company could be bound by a custom, but conceding that it would, it is necessary to show that it had knowledge of such custom, or that it was so general that it must be presumed to have known it. *Bradford v. Homestead Fire Ins. Co.* 54 Iowa, 598. 1880.

§ 9. The evidence of a custom of other companies in reference to authorizing certain acts of their agents is not admissible as tending to prove authority of agent of company sued. *Bradford v. Homestead Ins. Co.* 10 Ins. L. J. 141. 1880. Iowa.

§ 10. Insurance was upon "cotton seed oil factory;" issue was whether use of cotton gins constituted a breach of warranty in such description. The court charged the jury: "If you believe, from the evidence, that cotton gins are embraced fairly in the term cotton-seed oil factory, or if you believe, from the evidence, that when the risk was taken cotton gins were used openly and publicly in that factory, and that it was then usual in Texas to run them in connection with such factories, then find for the plaintiff." *Held*, error, in absence of evidence that any usage in Texas to run cotton gins in cotton-seed factories having been so general and well and long established as to charge the insurance company with notice. *Texas Banking Co. v. Hutchins*, 53 Texas, 61. 1880.

See Agent, § 3. Cancellation, 11, 18. Consummation of Contract, 14. Distance between Buildings, 1. Evidence, 12, 16, 38, 67, 88. Premium, 6. What Property is Covered, 20.

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## USE AND OCCUPATION.

§ 1. Prohibited use and occupation by a tenant, without knowledge of the assured, renders the policy void. *Steinmetz v. Franklin Fire Ins. Co.* 6 Phil. Rep. 21. 1865.

§ 2. The use or occupation of the premises insured by a prohibited business, trade or avocation, renders policy void without regard to the question of increase of risk. *Matthews v. Queen City Ins. Co.* 2 Cin. Supr. Ct. 109. 1872.

§ 3. Policy contained provision in writing, as follows: "the above premises are privileged to be occupied as hide, fat melting, slaughter and packing houses, and stores and dwellings, *and for other extra hazardous purposes*," and annexed was the classification of hazards into hazardous, extra hazardous, and specially hazardous. Property used for distillery purposes, classified as "specially hazardous," and the occupations as above specifically privileged belonged to same class. *Held*, the words in the policy "or other extra hazardous purposes," must be taken to mean purposes of the same class as those before specified, and the term "extra hazardous" must yield to the specifications accordingly. That plaintiff had a right to use premises for any specially hazardous purpose. *Reynolds v. Commerce Fire Ins. Co.* 47 N. Y. 597. 1872.

§ 4. Policy provided that if the premises should be used for the purpose of carrying on therein any trade or vocation denominated extra hazardous in a class of hazards annexed to the policy, that, from thenceforth so long as the same should be so used, the policy should be of no force or effect. Among the extra hazardous risks so specified was that of keeping a private stable, and, at the time of the date of the policy, and at the time of the fire, a part of the building insured was applied by the plaintiff to this use. It appeared that at the time the policy was obtained the agent of the company knew that the building in question was in part used as a stable. *Held*, that

the insurance was void by its terms, and that there could be no application of the doctrine of estoppel founded upon the knowledge of the agent. *Deweese v. The Manhattan Ins. Co.* 6 Vroom, N. J. L. R. 366. 1872.

§ 5. If an engine is occasionally used on premises insured at time policy is issued, its use thereafter cannot be relied upon to defeat the policy on the ground that the risk is thereby increased. *Commonwealth v. Hide & Leather Ins. Co.* 112 Mass. 136. 1873. And see *Whitney v. Black River Ins. Co.* 72 N. Y. 117. 1878.

§ 6. Policy covered merchandise hazardous and not hazardous, which included "cabinet ware." At time of its issue plaintiffs were lessees of entire building containing the stock. Subsequently plaintiffs permitted a firm to come in and occupy several floors for their business of finishing chairs. They employed glue, paint, alcohol, varnish, and benzine, requiring four or five barrels at a time. An alcohol lamp used for heating glue, exploded, and the fire ensued in consequence. Policy provided "that if premises should be used for purpose of carrying on any trade or occupation, or for keeping any articles specified as hazardous or especially hazardous in the second class of hazards, so long as same should be so used, policy shall be of no force or effect." And, also, "if the risk shall be increased by any means within control of assured, or by occupation of premises for more hazardous purposes than permitted by this policy, it shall be void." Oil, alcohol, painters' stock, turpentine, and varnish were specified as hazardous or specially hazardous in second class, and among the trades specified in same class as specially hazardous were "all workshops, manufacturing establishments, trades and mills not above enumerated as hazardous or extra hazardous." No previous mention made of trade of "chair finishing." *Held*, verdict should have been directed for defendant, and that conceding that a stock of "cabinet ware" was covered by the policy, it could not be so construed as to permit occupation of premises for purposes established by the evidence. That the term had reference to article in the finished state. *Appleby v. Astor Ins. Co.* 54 N. Y. 258. 1873.

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§ 7. When policy insures stock of family groceries contained in a building occupied as a meat and family grocery store, and there is a prohibition against the use of the building as a retail liquor store, and also a clause providing that nothing else than a distinct agreement clearly expressed and indorsed upon the policy should be construed as a waiver of any condition or restriction, and building was used as a retail liquor store, *Held*, that the fact that liquors were usually kept in a family grocery store did not prevent a forfeiture of the insurance. People's Ins. Co. v. Kuhn, 12 Heiskell, 515. 1873.

§ 8. The terms “machine and repair shop” do not necessarily mean that no work is to be carried on in such an establishment except in iron; it being shown in evidence that assured also carried on the business of making shingles. *Held*, that it was proper to be left to the jury to determine whether the business carried on was that of a machine and repair shop, it being manifest from the tariff of rates that if the term, machine shop, had alone been used, such term might have allowed the insured to do wood work on the premises. Chaplain v. Provincial Ins. Co. 23 Up. Can. C. P. 278. 1873.

§ 9. Policy insured the premises as a “dwelling, &c.” This was found to mean “&c.”, and that it was equivalent to the assertion that the premises were occupied for the purpose of a dwelling and other purposes. Building was, as a matter of fact, also used as a drinking saloon, which was known to the agent at the time he issued the policy. *Held*, plaintiff was entitled to recover. Gouinlock v. Manufacturers' Ins. Co. 43 Up. Can. Q. B. 563. 1873.

§ 10. Effect of returning a policy by company to assured after notification of change in occupation operates as a waiver of a forfeiture by reason of such use. Nedrow v. Farmers' Ins. Co. 43 Iowa, 24. 1876.

§ 11. The facts that business of planing and sawing lumber is carried on in an adjoining building, and the shavings are conducted by a tube to the boiler room in building insured, and there used for fuel, do not change

the nature of occupation of latter. *Keeney v. Home Ins. Co.* 71 N. Y. 396. 1877.

§ 12. When new business is incidental to the general business done when the insurance was effected and agent of the company having issued policy with full knowledge of the facts as to the use and occupation of the premises, company is estopped from setting up any defense predicated upon assured's omission to give formal notice. *Brink v. Merchants' Ins. Co.* 49 Vt. 442. 1877.

§ 13. Company is presumed to know the business which is made the subject of insurance, and for that reason to intend to protect what may properly appear to constitute a portion of it, as it is usually carried on. And it is error to reject evidence bearing upon this question. *St. Nicholas Ins. Co. v. Merchants' Ins. Co.* 11 Hun, 108. 1877.

§ 14. If with other inquiries company fails to inquire as to occupation unless there is proof of concealment of the fact, it is not evidence of bad faith which will vitiate the policy. In such case and no statement is made in policy as to occupation, it must be assumed that the insurance was made without regard to occupation. *Browning v. Home Ins Co.* 71 N. Y. 508. 1877.

§ 15. When policy describes building insured as being occupied for the manufacture of toys and it contains a condition "if the occupation be changed from one of the class denominated specially hazardous to that of another of the same class without written consent, that it should be void"; and subsequently the assured manufactured toy trunks, small nursery chairs, berry and market baskets, table mats, chair stretchers and mop handles. *Held*, that a change of occupation to defeat the insurance must be of a substantial substitution of one distinct and specially defined kind of manufacturing from that of another equally distinct and definite kind of business, and that the condition referred to a permanent abandonment of the old business and the adoption of a new business of a like hazardous risk; that the business of the manufactory in question

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was not substantially changed, as the new business was incidental to that which was done when the insurance was effected. *Brink v. Merchants' Ins. Co.* 49 Vt. 442. 1877.

§ 16. An *occasional* use by a carpenter will not make policy void. *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121. 1878.

§ 17. Policy provided that "if any change whatever shall take place in the situation, occupation, use or condition of the premises insured without written consent," it should be void. Part of second floor was let for a Tilden and Hendricks club room. In what manner the club used it did not appear. *Held*, that the object of the clause was to protect against increased risk; that the change must be substantial, and that a mere change of tenants was not such a change in the use and occupation as to forfeit the policy. *Miller v. Oswego and Onondaga Ins. Co.* 18 Hun, 525. 1879.

§ 18. Policy provided that if property should cease to be operated as a mill, it should be void. Local agent of company knew when policy was issued that building was used for storage purposes, and was not being operated as a mill. *Held*, that the continuance of such use did not violate the condition. *Humphry v. Hartford Fire Ins. Co.* 15 Blatch. 504. 1879.

§ 19. Under Maine statute change in occupancy or vacancy is not available as a defense unless risk is thereby materially increased. Company has right to have this question submitted to jury. *Thayer v. Providence Ins. Co.* 70 Me. 531. 1880.

§ 20. The fact that a large building covering less than one-fourth of an acre, besides being the residence of the assured is also used as a hotel does not effect the operation of statute making it a homestead so that judgments against the assured are not liens upon it. *Harriman v. Queen Ins. Co.* 49 Wis. 71. 1880.

See Alteration, § 2. Cancellation, 22. Evidence, 44, 70, 72. Illegality of Contract, 8. Increase of Risk, 17. Lighting, 1. Pleading and Practice, 27. Storing and Keeping, 8, 5, 6. Title, 29. Usage or Custom, 10. Warranty and Representation, 5, 6, 81, 55, 57, 71, 72, 84, 100, 106.

## VACANT OR UNOCCUPIED.

§ 1. Policy provided that if the building insured should become vacant or unoccupied, notice should be given to the company that directors may decide whether it would be prudent to retain the risk. Failing such notice and consent on part of the company, policy should be void. *Held*, that the condition did not relate to an absence from personal occupation for a day or so; that when the non-occupation is longer the policy remains valid until the insured has had a reasonable time for giving notice to the company, and that if a fire takes place before such reasonable time has expired, company is liable. Three days' time under the circumstance of this case held not to be unreasonable. *Canada Land Co. v. Canada Agricultural Ins. Co.* 17 Grant Ch. 418. 1870.

§ 2. There is no "change of possession" within the meaning of policy, by temporary absence of assured and family, leaving property in charge of agent or servant. *Shearman v. Niagara Fire Ins. Co.* 46 N. Y. 526. 1871.

§ 3. Condition was that "if premises shall become vacant and unoccupied, or the risk be increased by erection of neighboring buildings, or by any means whatever within the control of the assured," without consent of the company policy should be void. *Held*, that condition was in nature of a warranty, that plaintiff could not recover, house being vacant, without proof that the vacation of the house was beyond his control. *N. A. Fire Ins. Co. v. Zaenger*, 63 Ill. 464. 1872.

§ 4. Policy provided that "buildings unoccupied are not covered by this policy, unless insured as such." Assured and his servants while engaged in carrying on a farm contiguous to the house and barn insured, took their meals in the house, and the barn was used for the usual purposes for storing hay and tools, but no cattle were kept in it. *Held*, that the buildings were not occupied. That occupancy as applied to such buildings implies an

actual use of the house as a dwelling place, and such use of the barn as is ordinarily incident to a barn belonging to an occupied house, or at least something more than a use of it for mere storage. *Ashworth v. Builders' Mut. Ins. Co.* 112 Mass. 422. 1873.

§ 5. The fact that assured stated to the agent that she would leave the premises temporarily does not prevent a forfeiture under condition in policy providing that if premises should become unoccupied it should be void. *Ætna Ins. Co. v. Burns*, 5 Ins. L. J. 69. 1874. Ky.

§ 6. Vacancy of a part of the property insured does not avoid the insurance; if it increases the risk it may do so, but the burden of proof rests upon the company. *Vryan v. Peabody Ins. Co.* 8 W. Va. 605. 1875.

§ 7. Policy provided that "if the above-mentioned premises shall become vacant or unoccupied and so remain with the knowledge of the assured without notice and consent in writing," it should be void. At time of fire premises had been vacated by the tenant, and had been unoccupied about thirty-three days with the knowledge of the assured, and without notice to or consent of the company. During all this time assured was endeavoring to obtain a tenant. *Held*, that the words "*and so remain*" qualified the condition which had no application to a temporary vacancy caused by a change of tenants. *Kelley v. Home Ins. Co.* 5 Ins. L. J. 134. 1875. U. S. Circuit, Kans.

§ 8. Tenant in possession removed from the house in question about two months prior to the fire. He notified the assured who requested him to lease to some one else, but afterward countermanded this direction, and property remained unoccupied until the fire. The tenant retained the key for purpose of delivery to assured on his return from another State. There was a table, crib, and a straw tick in house at time it was burnt. *Held*, that house was "vacant and unoccupied and that policy was void." *American Ins. Co. v. Padfield*, 78 Ill. 167. 1875.

§ 9. Policy provided that "in case the house be left unoccupied without giving immediate notice to the company" it should be void. Assured left the house Jan. 15, 1871, and thereafter boarded twelve miles distant until March 30, 1871, when fire occurred. During this interval the house was not inhabited by any human being, except one night when plaintiff remained there. All the household goods and effects were left in the house and so remained until the fire. Plaintiff visited the house occasionally and maintained a general oversight over the property. *Held*, that occupation of a dwelling-house is living in it, not mere supervision over it, that there could not be a cessation of occupancy for any considerable time and that under facts of this case plaintiff could not recover. *Paine v. Agricultural Ins. Co.* 5 T. & C. 619. 1875.

§ 10. Policy contained this provision: "If the dwelling house hereby insured becomes vacated *by the removal of the owner or occupant*," it would be void unless written consent was obtained. The absence of assured and his family was for a considerable period but was temporary in its nature and for a special purpose. There was evidence that he still retained the house as his residence and left his furniture and clothing of his family there; that during this absence his wife took care of the house, going there every week to cleanse it and from time to time obtain such articles as were required for use, and it was the intention to return as soon as the assured returned from his business trip, the cause of the absence. *Held*, that it should have been left to jury to determine whether house had been vacated by removal; the words of condition had reference to a permanent removal and entire abandonment as place of residence. *Cummins v. Agricultural Ins. Co.* 67 N. Y. 260. 1876. Rev'g 5 Hun, 554.

§ 11. Policy provided that if the premises should become vacated by the removal of the owner or occupant without notice or consent it should be void. Building was occupied by a tenant of assured and rent had been settled for up to May, 1872. The tenant left in July, 1871, and went to another place, his family having left a

short time previous. The wearing apparel of the tenant and his family had all been taken away and a portion of what little furniture he possessed. He intended to return the next spring or earlier if business should be dull at the place where he went. No person lived in the building after he left. Fire occurred October 30th, 1871, up to which time he had not decided to return at any definite time. Neither the assured nor the defendant had any notice that the tenant had vacated the premises until after the fire. *Held*, that the premises were vacated within the meaning of the policy and that the neglect of the plaintiff to give notice to the company could not be construed as a mistake under Gen. Stats. ch. 157, sec. 2. *Sleeper v. Ins. Co.* 56 N. H. 401. 1876. *Overruling Chamberlain v. Ins. Co.* 55 N. H. 249. 1875. And see *Hill v. Ins. Co.* 6 Ins. L. J. 314. 1877.

§ 12. Policy provided that company should not be liable for any loss which may happen while the house is "left without an occupant or person actually residing therein," but that a temporary absence of the members of his family, none of the household fixtures being removed, should not be construed as non-occupancy. It appeared that the house insured was in possession of a tenant; that the fire took place on the 10th of September, 1875, but that the tenant did not reside, sleep or eat on the premises for 6 or 8 days before the fire, nor did any other person. The goods of the tenant were removed about forty-eight hours before the fire. The assured was not guilty of any personal default; he lived 7 miles from the house and was not aware that the tenant had ceased personally to occupy. Tenant held the premises by the month; he was in arrears for rent and his goods distrained. The month did not expire until the 24th of September. The assured did not suppose he would quit the premises before that day and had a person ready to take possession as soon as the tenant left. *Held*, there was a breach of the condition, and the plaintiff could not recover. In such a case the question of increase of risk is immaterial. *Abrahams v. Agricultural Ins. Co.* 40 Up. Can. Q. B. 175. 1876.

§ 13. When a company receives a fee and executes an assent to a transfer or assignment through a local agent, assured is warranted in assuming that notice of a vacancy to such local agent is sufficient. *Williams v. Canada Mut. Ins. Co.* 27 Up. Can. C. P. 119. 1876.

§ 14. A building does not become vacant or unoccupied if a person retains a room in which he is accustomed to sleep, taking his meals elsewhere. *Hartford Fire Ins. Co. v. Smith*, 3 Col. 422. 1877.

§ 15. Under a clause providing that if any change should occur affecting the occupancy of the property whereby risk should be increased, the same should be made known to the company and policy canceled or a corresponding increased premium paid at the option of the company, it is proper for the court to refuse to charge the jury that leaving the premises vacant without notice avoided the policy, and to charge them that it would not do so unless done in bad faith and with a design to exposing the building to extra hazard. *Residence Fire Ins. Co. v. Hannawold*, 37 Mich. 103. 1877.

§ 16. Policy contained provision that "if house shall remain vacant or unoccupied for the space of ten days without written notice and consent," it should be void. The trial judge charged the jury that if the house had not been used as a dwelling place by some one within ten days of the fire, policy would be void. Also that the facts that the tenant's furniture, or some of it, remained in the house, and the key had not been surrendered to the landlord until within less than ten days of the fire, would not be an occupancy of the premises, if the tenant and his family had moved into another house, where they slept and took their meals. *Held*, no error. *Corrigan v. Connecticut Ins. Co.* 122 Mass. 298. 1877.

§ 17. Policy provided that if building should be vacated by owner or occupant, notice should be given to company, stating particulars and length of time. Assured notified agent that house was to be vacant about four weeks and stated that "they would not move their

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things." Assured did in fact substantially remove all his household property. *Held*, that defendant having no notice of removal of the property, plaintiff could not recover. *Hill v. Equitable Ins. Co.* 6 Ins. L. J. 314. 1877. N. H.

§ 18. Policy provided that if "premises should become vacant or unoccupied" it should be void. Premises in question were occupied by a tenant of assured, who moved into another house shortly before the fire, leaving some of his furniture, which had not been removed at time of loss. Court charged the jury that "if the vacancy of the building was not within the means or control of the plaintiff he could recover. *Held*, no error. *Atlantic Ins. Co. v. Manning*, 3 Col. 224. 1877.

§ 19. Delays and interruptions incident to the business of conducting a saw-mill, although involving a temporary discontinuance of the active use of the mill for sawing purposes, do not make it "vacant and unoccupied" within meaning of the policy. *Whitney v. Black River Ins. Co.* 72 N. Y. 117. 1878. Aff'g 9 Hun, 37.

§ 20. A tenant having removed from a dwelling-house a day before it was destroyed by fire. *Held*, that whether the house was "occupied" or not within the meaning of the policy, a proper question for the jury. *Wait v. Agricultural Ins. Co.* 13 Hun, 371. 1878.

§ 21. An occasional absence for a single night, even though it should so chance to be the night of the fire, does not make a house vacant or unoccupied. If there is any evidence tending to show that the house was occupied, it is error to take the case from the jury. *Chandler v. Commerce Fire Ins. Co.* 88 Pa. 223. 1878.

§ 22. Building was described in the policy as a "tenement frame block." There did not appear to be more than one building, which at time of fire was fitted up for ten tenements, two of which were actually occupied by assured and his family, and he was in legal possession of the whole and had control of the same. Policy contained

provision that it should be void "whenever a building hereby insured shall be unoccupied." *Held*, that a tenement block insured as a single building could not be regarded as unoccupied with two of the tenements in actual use and occupation as residences. *Harrington v. Fitchburg Ins. Co.* 124 Mass. 126. 1878.

§ 23. When house is vacant with knowledge and consent of agent of company, and policy remains in his possession until after the fire, when it is delivered to the assured who had no knowledge of its terms, company is estopped from availing itself of condition in policy as to vacancy. *St. Paul Fire Ins. Co. v. Wells*, 89 Ill. 82. 1878.

§ 24. Premises do not cease to be occupied when assured sleeps in an adjoining house, leaving furniture and wearing apparel in former to which he was accustomed to return daily. *Gibbs v. Continental Ins. Co.* 13 Hun, 611. 1878.

§ 25. Policy provided that "so long as property insured should be unoccupied it would cease and be of no force or effect." Upon the trial court charged jury in substance that a few days vacancy pending a change of tenants would not void the policy in case of loss. *Held*, error, that the contract by its terms was suspended during such short and temporary period of unoccupancy, and became operative on re-occupancy. *Aetna Ins. Co. v. Myers*, 63 Ind. 238. 1878.

§ 26. Assured, about two weeks before the fire, went to another place to reside and lived there until after the fire. A car load of furniture was shipped to the new dwelling place and there was about \$300 worth of furniture left in the house. Assured left instructions with an agent to sell this furniture and also to rent the house. Another person was left in possession with instructions to remain in possession and sleep in the house until it was rented. This latter person left the house three or four days before the fire occurred, and was at the new residence of the assured when the fire occurred. He left no one in the house,

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but gave the keys to another agent with instructions to take charge of the house and rent it if he could before he returned. Policy contained condition if house should become unoccupied it should be void. *Held*, that the house was unoccupied within the meaning of the policy. Cook v. Continental Ins. Co. 70 Mo. 610. 1879.

§ 27. Tenant of assured moved out of the building seventeen days before the fire, and it remained tenantless and unoccupied until it was destroyed. Policy provided that "if premises should become vacant or unoccupied, and so remain, without consent in writing, &c.," it should be void. Court was requested to charge jury that "if they found from the evidence that premises were vacant and unoccupied at time of fire without notice to defendant, plaintiff could not recover," which was refused. Jury were then charged that "to avoid policy building must have been vacant for an unreasonable length of time as to materially increase the risk, and the question of an unreasonable length of time was for them to determine." *Held*, error; that instruction asked by defendant should have been given to the jury. Dennison v. Phoenix Ins. Co. 52 Iowa, 457. 1879.

§ 28. A boat which has been left lying on the beach without any occupants, her furniture removed, and no use made of her, is "unoccupied." Reid v. Lancaster Ins. Co. 19 Hun, 284. 1879.

§ 29. When policy provides that it should be null and void, if without written consent, the house insured should become vacant by removal of owner or occupant, or cease to be occupied in the usual or ordinary manner that dwelling-houses are occupied, *Held*, that the assured was not relieved from the effect of this condition by showing that his tenant left the premises without his knowledge and consent, and that as soon as he discovered the fact he endeavored to procure a new one. McClure v. Watertown Fire Ins. Co. 90 Pa. 277. 1879.

§ 30. *Semble* that the assured is not required to give notice of a temporary vacancy, such as is incidental to a

change of tenants. Alston v. Ins. Co. 80 N. C. 326. 1879.

§ 31. When policy provides that it shall be void in case the premises insured shall become vacant or unoccupied, the question of increase of risk is immaterial . . . it is error for the court to charge the jury in such a case that they could not find for defendant unless they found that the risk was increased by the vacancy. Ins. Co. v. Long, 51 Tex. 89. 1879.

§ 32. Assured was accustomed to occupying house insured as a summer residence, and in the early part of December of each year family would leave it for the winter and occupy rooms in another place. The house was quite expensively furnished. When the family moved, in December, 1876, for the winter, this furniture was left in the house in the same situation as when in use, and the house, when no member of the family was there, remained locked up, no custodian being left in possession. It appeared that assured, during the entire winter, visited the premises as often as once a month, and that her husband during the whole time, with the exception of a few days when he was absent in New York, visited the house several times a week and slept there from two to five nights each week. He prepared and took his meals in the house, and on several occasions he received and entertained his friends there. The last of these occasions was Sunday, the second day before the fire. On that day he spent nearly the entire day and evening in the house with a number of his associates. *Held*, that the house during none of this period was unoccupied. The building being insured as a dwelling, the occupancy stipulated for must be deemed to be such as properly pertained to a building of that character; that the assured was only bound to maintain such occupancy as pertained to the ordinary use of the building in the manner and for the purposes for which it was designed to be used; and the fact that the building had been used previously for a summer residence was a circumstance of considerable significance, and that the question of occupancy or non-occupancy was properly left to the jury. Western Assur. Co. v. Mason, 5 Bradwell, 141. 1879.

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§ 33. Assured being required to give notice to the company when house becomes unoccupied, is bound to do so within a reasonable length of time, and a failure to give such notice for six weeks, when the company's principal office is but a few miles distant, cannot be regarded as reasonable time. *Alston v. Ins. Co.* 80 N. C. 326. 1879.

§ 34. Assured had determined to leave the premises and move to another State, and for several days before the fire was actively engaged in making preparations to do so. He had already rented premises to another who was to have taken possession on Saturday, but was prevented from doing so by rain. The day before assured sold such articles as he did not wish to take with him, and in the evening of same day his family left the premises without any intention of returning, at least until after assured's return from Nevada, where he subsequently went. Assured remained in premises Friday and Friday night, having retained bed, bedding, and some other articles of little value, his family in meantime having stopped in a neighboring city, waiting until he could perfect his arrangements for leaving. He also remained on premises the next day until about nine o'clock in the evening when he went to the city where he spent balance of the night. On Sunday he returned to the premises and remained there until seven o'clock in the evening, when he went to the city and spent night there, leaving his bed, bedding, &c., on the premises. That night fire occurred. *Held*, that premises were not vacant and unoccupied. Question depends upon intent and proper to submit to jury. *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64. 1879.

§ 35. School-house insured November 21, 1871, for five years. After April, 1875, no school was held, furniture was removed, and building was then rented and used as a dwelling. Last occupied as a dwelling April, 1876, from which time to the fire, October 14, 1876, house remained vacant and unoccupied. Plaintiff contended that company insuring property as a school-house must be assumed to have intended that the building should be vacant as school-houses are occasionally, especially during

vacation. *Held*, that policy was void. American Ins. Co. v. Foster, 92 Ill. 335. 1879.

§ 36. A company does not waive condition in regard to occupancy by requiring assured to furnish proofs of loss. Fitchpatrick v. Hawkeye Ins. Co. 53 Iowa, 335. 1880.

§ 37. Policy provided that "if the premises insured shall, at any time during the life of this policy, become vacant, by the removal of the owner or occupant, without immediate notice to this company and indorsement made on the policy, this insurance shall be void and of no effect." It also contained provision for cancellation at option of company by giving notice in writing and payment of unearned premium. *Held*, that vacancy did not of itself avoid the policy, and that the object of requiring notice was accomplished by receipt of the notice. Company having thus acquired knowledge of vacancy may, in its discretion, terminate the insurance only by written notice and payment of the unearned premium. Wakefield v. Orient Ins. Co. 50 Wis. 532. 1880.

§ 38. Work, at time of fire, had been stopped for five days, and how soon it would have been renewed was uncertain. Mill continued to be used for storage and delivery of goods, requiring daily visits of one or two persons. *Held*, not to be "unoccupied;" that such term in the policy had no reference to a temporary suspension of work in a mill. Albion Lead Works v. Williamsburg City Ins. Co. 9 Ins. L. J. 435. 1880. U. S. Circuit, Mass.

§ 39. Family leaving house on excursions, visits, or on other temporary occasions, there being no intention of leaving it, do not cease to occupy it. Stupetzki v. Transatlantic Ins. Co. 9 Ins. L. J. 521. 1880. Mich.

§ 40. Policy insured building, describing it as "frame dwelling-house, occupied as a boarding-house. Occupancy, tenant." Tenant left the premises during the continuance of the policy. The assured notified company's agent that the house would be vacant until April, asking for consent.

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Agent promised that it would be all right. Policy contained a condition that if risk should be increased by any means beyond the control of the insured, he should inform the company thereof as soon as it comes to his knowledge, and whether so informed or not, the company may raise the rate of premium or terminate the insurance, and that, if the risk is increased within his knowledge or control without written consent of the company, that it should be void. There was no condition providing that a vacancy of the building should affect the insurance. *Held*, that the temporary vacancy arising from the leaving of a tenant was to be deemed as a part of the risk, and that it was sufficient for the assured to give notice of the fact to the company, and that the question of increase of risk should be submitted to the jury. *Lockwood v. Middlesex Mut. Ins. Co.* 47 Conn. 553. 1880.

§ 41. Policy contained condition that it should be void if the premises should become "vacant *and* unoccupied." The dwelling insured was the summer residence of the assured. Fire occurred in April, 1877. Assured resided in the house during summer and fall of 1876, and removed therefrom in November of that year to the city of New York, intending to return about the middle of May. He left all his furniture in the house, which was furnished throughout, and left the house in charge of a person who lived near. *Held*, that house must not only be unoccupied, but also vacant to render it void; and that it was not *vacant* within meaning of the policy. *Hermann v. Merchants' Ins. Co.* 81 N. Y. 184. 1880.

§ 42. A vacant house is literally an empty house. One or more persons may live in a house, and in either case it is occupied. They may have much or little furniture, and in neither event is it vacant. The question as to whether a house is "vacant and unoccupied" is proper to be determined by the jury. *Woodruff v. Imperial Fire Ins. Co.* 83 N. Y. 133. 1880.

§ 43. Policy contained clause that it should become void in event of the house being vacant and unoccupied. Court charged the jury "If parties moving out and others

moving in, and the necessary time for such change of situation occurs between the moving out and the moving in, unless such time is unreasonable, the policy would not become invalidated," and left it to the jury to say what would be a reasonable time. Approved. Woodruff v. Imperial Fire Ins. Co. 83 N. Y. 133. 1880.

§ 44. Policy provided that a family should live in the hotel insured throughout the year. At close of the summer season assured, with his wife and sons, left the hotel, leaving there a number of their employees, at work about the premises and in charge of the property, under direction and management of the assured. All of these employees ate at another hotel in the vicinity, and most of them slept there. Two of them roomed and slept in hotel insured, having their clothing there, and working outside and about the building, going in and out several times a day. Both were in building at time of fire, and escaped through a window. *Held*, that whether a house is or is not occupied by a family is a question of fact to be determined by a jury. That a family is a number of persons who live in one house and under one management or head. No specific number is required to constitute a family. It is not necessary they should eat in the house where they live. Nor is it necessary that they should be employed in the house or about it, nor is it material that they are hired. The precise question is, are they living there together under one head or manager? This is one of fact, not of law. The evidence sustaining a verdict for plaintiff, judgment ordered accordingly. Poor v. Hudson Ins. Co. 9 Ins. L. J. 428. 1880. U. S. Circuit, N. H.

§ 45. Dwelling-house insured was used as a country residence. Assured and his wife were in the habit of visiting it every two weeks, and a farmer and members of his family living on the grounds made weekly tours of inspection, and supervised it from his own house. *Held*, that the house was unoccupied, and that although the farm premises and some of the buildings were in actual occupation, their use did not extend to and take in the dwelling burned. Hermann v. Adriatic Ins. Co. 12 N. Y.

Week. Dig. 293. 1881. N. Y. Ct. App. Rev'g 13 Jones & Sp. 394.

§ 46. Policy provided, that, "if the premises hereby insured shall become vacant or unoccupied, or if the property insured be a mill or factory, and shall cease to be operated, and so remain for a period of more than fifteen days without notice to the company and consent indorsed thereon, in every such case the policy shall be void." *Held*, that by construction policy is to be void if the premises (a dwelling-house in this case) become vacant or unoccupied, and so remains for a period of more than fifteen days without notice. *Miaghan v. Hartford Fire Ins. Co.* 24 Hun, 58. 1881.

See Alienation, § 25. Estoppel, 16, 17, 37. Evidence, 86. Increase of Risk, 1, 3, 4, 16, 19, 25. Use and Occupation, 19. Waiver, 11, 23, 24, 37. Warranty and Representation, 50, 74, 100.

### VALUED POLICY.

§ 1. Policy insured \$2,500 on oil paintings, as per schedule, &c. The schedule referred to was made up and furnished to defendant's agent after the application and date of policy, enumerating over one hundred paintings, as follows:

President Taylor and Cabinet . . .	\$1,000
" Harrison " " . . .	1,000
" Washington " . . .	1,000
&c.	

*Held*, not a valued policy. *Luce v. Springfield Ins. Co.* 2 Ins. L. J. 443. 1873. U. S. Circuit, Mich.

§ 2. In an action upon a valued policy plaintiff is not required to prove his interest in subject insured by a plea of the general issue. *Roos v. Merchants' Mut. Ins. Co.* 27 La. Ann. 409. 1875.

§ 3. When statute provides that the amount of insurance written in the policy shall be taken and deemed the true value of the property at the time of the loss, and that it shall be the measure of damages, such an act is founded upon public policy, and its provisions cannot be waived even by express contract, hence the stipulation in the contract providing for another measure of damages is inoperative. *Reilley v. Franklin Ins. Co.* 43 Wis. 449. 1877.

§ 4. Valuation agreed upon, and for which insurance is issued, though it exceeds the real value of the property, if made in good faith and without fraud, is conclusive between the parties. *Harrington v. Fitchburg Ins. Co.* 124 Mass. 126. 1878.

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## WAIVER.

§ 1. The mere fact that an agent of the company has given evidence as to the origin and circumstance of the fire under legal proceedings instituted for that purpose, is not evidence of waiver of objection in regard to assured's having made false statements in proofs of loss. *Cashman v. Lond. & Liv. Fire Ins. Co.* 5 Allen, N. B. 246. 1862.

§ 2. Renewal by agent, with knowledge of existence of other insurance, waives indorsement upon the policy. *Carroll v. Charter Oak Ins. Co.* 1 Abb. Ct. App. Dec. 316. 1868.

§ 3. Assured's attorney met agent of the company on the street and said that proofs were ready except certificate, which he said it was doubtful whether he would get in time, to which the agent replied, it was not material, and to procure a certificate as soon as he could. *Held*, evidence of waiver. *Crozier v. Phoenix Ins. Co.* 2 Hannay, N. B. 200. 1870.

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§ 4. When no particular form of approval to a transfer is required, knowledge by company of the facts and retention of the premium, with such knowledge, is evidence from which jury may find that assent was given. *Hendrickson v. Queen Ins. Co.* 30 Up. Can. Q. B. 108. 1870.

§ 5. A local agent waives conditions requiring proofs of loss and suit to be brought within limited time by stating that the former are "all right," and loss would soon be paid. *Ide v. Phoenix Ins. Co.* 2 Biss. 333. 1870.

§ 6. There can be no waiver where the act or omission to act or statement on part of the company is procured by the false representation of the assured. *Taylor v. Ins. Co.* 51 N. H. 50. 1871.

§ 7. A condition of forfeiture may be waived by any act from which consent of company may be inferred. *Shearman v. Niagara Fire Ins. Co.* 46 N. Y. 526. 1871.

§ 8. Agent promising, on being notified of a transfer, that he would indorse consent on the policy on its production, does not operate as a waiver. *Equitable Ins. Co. v. Cooper*, 60 Ill. 509. 1871.

§ 9. Policy provided that "nothing but a distinct, specific, agreement, clearly expressed and indorsed, shall operate as a waiver of any printed or written condition, warranty or restriction therein." Company relied upon this clause to defeat a claim of waiver in connection with proofs. *Held*, that it referred to those conditions and provisions of the policy which enter into and form a part of the contract of insurance and are essential to make it a binding contract, and which are properly designated as conditions; and that it has no reference to those stipulations which are to be performed after a loss has occurred. *Franklin Fire Ins. Co. v. Chicago Ice Co.* 36 Md. 102. 1872. *s. p. Rokes v. Amazon Ins. Co.* 51 Md. 512. 1879. And see *Walsh v. Hartford Ins. Co.* 73 N. Y. 5. 1878. *Hartford Ins. Co. v. Webster*, 69 Ill. 392. 1873. *Meyers v. Germania Ins. Co.* 27 La. Ann. 63. 1875.

§ 10. A broker cannot as agent of the company waive condition requiring prepayment of the premium. *Marland v. Royal Ins. Co.* 71 Pa. 393. 1872.

§ 11. If agent with knowledge that the building is unoccupied issues a policy with a clause providing that it is void if vacant, there is a waiver of any written or printed condition respecting the occupation of the premises. *Devine v. Home Ins. Co.* 32 Wis. 471. 1873.

§ 12. The charging of the premium to an agent, and the agent's agreement to give time for its payment, and subsequent payment to the company, constitute a waiver. *Dayton Ins. Co. v. Kelley*, 24 Ohio, 345. 1873.

§ 13. Policy contained provision that "the assured hereby covenants that the representation given in the application for this insurance contains a just, true and full exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured, as far as the same are known to them and material to the risk, and that if any material fact or circumstance shall not have been fairly represented, policy shall be void." Policy was issued upon a printed slip describing the property without requiring any representation in regard to its situation, value and risk. *Held*, that company must be deemed to have waived above condition and could not claim that policy was void because the assured did not fully disclose situation and risk. *Commonwealth v. Hide and Leather Ins. Co.* 112 Mass. 136. 1873.

§ 14. Company by demanding from the assured after a loss plans and specifications of the building destroyed with knowledge of the existence of other insurance, is estopped from insisting upon a forfeiture of the policy on the ground of other insurance. Such an act must be treated as an election on the part of the company to treat the policy as a valid and subsisting contract. *Webster v. Phoenix Ins. Co.* 36 Wis. 67. 1874. *s. r. Titus v. Glen's Falls Ins. Co.* 81 N. Y. 410. 1880.

§ 15. A mortgagee applied to an agent for an insurance upon his interest, and form of policy was left to lat-

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ter. It was issued in name of owner loss payable to the mortgagee as interest might appear. Subsequently, the mortgagee acquired the title by foreclosure, gave notice to the agent and received consent "that the policy might stand as security for plaintiff's interest," the agent agreeing that the proper entries would be made. Policy contained usual condition against transfer or change of title. *Held*, that the forfeiture was waived, and that company was estopped after a loss from averring want of consideration, and also from insisting upon previous forfeiture. *Pratt v. N. Y. Central Ins. Co.* 55 N. Y. 505. 1874. Aff'g 64 Barb. 589.

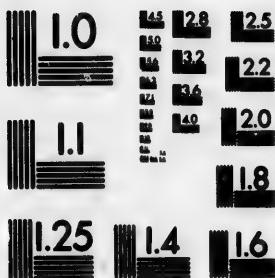
§ 16. Policy provided that "there shall be no waiver or evasion of any of the terms or conditions of this policy, and no agent or servant of this company has any right or power to waive or to dispense with any of the terms or conditions of insurance as printed and contained in the application or in this policy." Whether this should be construed as speaking from the time when the policy is received instead of being made to operate by relation from the date of the application when no conditions were brought to the knowledge of the assured except those which were made a part of the application itself *query?* *Michigan State Ins. Co. v. Lewis*, 30 Mich. 41. 1874.

§ 17. Waiver is a question of fact and it is error to refuse to submit to the jury where there is contradictory testimony. *Underwood v. Farmers' Joint Stock Ins. Co.* 57 N. Y. 500. 1874.

§ 18. A general agent has power to waive any express condition in the policy, and his statement to the assured that a condition in the policy in relation to other insurance has been sufficiently complied with estops the company from controverting that fact. *Mentz v. Lancaster Fire Ins. Co.* 79 Pa. 475. 1875.

§ 19. If company acts upon an informal notice of the loss, it is a waiver of its insufficiency. *West Rockingham Fire Ins. Co. v. Sheets*, 26 Grat. 854. 1875.

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§ 20. After issue of policy assured and his wife conveyed property to another by whom and his wife it was immediately conveyed to the wife of the assured. Action was brought in the name of both the assured and his wife. In order to establish a claim of waiver of condition in the policy, making it void in event of a change in the title of the property, it was proved that after the execution of the conveyance the wife of the assured, for the purpose of having the policy changed if necessary, went to the office of the company and notified the secretary that the deed had been made and was informed by him "that it made no difference, and that no change was necessary;" and that upon being so informed she took no further steps, but suffered the policy to remain as it was. *Held*, that the evidence did not establish claim of waiver; first, it does not aid the assured, because having parted with his interest the loss was not his; second, it does not aid his wife, because it was not alleged in the complaint nor was there any evidence in the case tending to show any assignment of the policy to her by her husband. Without such assignment she would have no interest in the policy which the waiver could affect. *Langdon v. Minnesota Mut. Ins. Co.* 22 Minn. 193. 1875.

§ 21. If at the time of a renewal of a policy agent knows of a change which has taken place in regard to the title of the premises, such renewal is a waiver of conditions of the policy in relation thereto. *Mechler v. Phoenix Ins. Co.* 38 Wis. 665. 1875.

§ 22. An adjuster having authority to examine into the circumstances of a fire to adjust the loss and settle and report to the office, cannot waive a condition in respect to other insurance or in any way except in writing. *Mason v. Hartford Fire Ins. Co.* 37 U.S. Can. Q. B. 437. 1875.

§ 23. Policy contained provision "that no agent of the company shall be deemed to have waived any of the terms and conditions of the policy unless such waiver is indorsed in writing," and also required consent to be indorsed in case of vacancy. *After* policy was issued as

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sured applied to local agent of company for permission that the house insured should remain vacant, asking if it was necessary to have it indorsed on the policy. Agent replied that it was not necessary, that he had entered it in the books and it was all right. No report was made to the company. *Held*, plaintiff presumed to have known what contract contained, and that the oral consent was an act in excess of the known authority of the agent, who could waive condition only in prescribed manner, that is by indorsement on policy. *Walsh v. Hartford Fire Ins. Co.* 73 N. Y. 5. 1878. *Rev'g 9 Hun, 421. Overruling Hotchkiss v. Germania Fire Ins. Co.* 5 Hun, 90. 1875. *s. p. Hartford Ins. Co. v. Webster,* 69 Ill. 392. 1873. *Meyers v. Germania Ins. Co.* 27 La. Ann. 63. 1875.

§ 24. Condition that policy shall be void "if premises are or shall become vacant or unoccupied, without consent indorsed," is waived by knowledge of company's agent of the facts at time of issuing of policy and his assent to an understanding that property shall be vacant for a certain time. *Cone v. Niagara Fire Ins. Co.* 60 N. Y. 619. 1875.

§ 25. Policy contained condition "that anything less than a distinct agreement indorsed on this policy shall not be construed as a waiver, &c." After issue of the policy the president of the company gave verbal consent to the assured to remove goods into the adjoining building, assuring him it was not necessary to bring the policy. *Held*, company estopped from insisting upon above condition as a defense. *Maryland Fire Ins. Co. v. Gusdorf,* 43 Md. 506. 1875.

§ 26. Local agent may vary and waive the terms of a policy by parol, notwithstanding it expressly provides that consent can only be given by a written indorsement, even after its issue. In such a case knowledge and conversation with the assured upon the subject, without objection or any suggestion that any breach of condition had been created or would be relied upon, is sufficient to make a case of estoppel. *Westchester Fire Ins. Co. v. Earle,* 33 Mich. 143. 1876.

§ 27. The facts that an adjuster visited place of fire and made inquiries without authority from defendant and without knowledge of the plaintiff, are no evidence of waiver of condition requiring proofs within specified time. It seems, that if even the plaintiff had known of the acts of the adjuster they could not have legitimately influenced his action or omission to act in respect to the proofs. *Blossom v. Lycoming Fire Ins. Co.* 64 N. Y. 162. 1876.

§ 28. A waiver to be operative must be supported by an agreement founded upon a valuable consideration, or the acts relied on as a waiver must be such as to estop a party from insisting on a performance of the contract or the forfeiture of the conditions. *Ins. Co. v. La Croix*, 45 Tex. 158. 1876. See §§ 48, 52, 53.

§ 29. Submission to arbitration is a waiver of all proofs. *Bammessel v. Brewers' Fire Ins. Co.* 43 Wis. 463. 1877.

§ 30. As an insurance company may waive any condition in the policy inserted for its benefit, a forfeiture does not necessarily follow upon a breach, but depends upon option of the company. *Ins. Co. v. Norton*, 6 Otto, 234. 1877.

§ 31. Condition in policy requiring written indorsement of consent may itself be waived. *Gans v. St. Paul Fire Ins. Co.* 43 Wis. 108. 1877.

§ 32. An adjustment of a loss made with a knowledge of all the facts amounts to a waiver of all the defenses based on provisions in the policy. *Levy v. Peabody Ins. Co.* 10 W. Va. 560. 1877. And see *Eagan v. Aetna Fire Ins. Co.* 10 W. Va. 583. 1877. *Smith v. Glen's Falls Ins. Co.* 62 N. Y. 85. *Ill. Mut. Ins. Co. v. Archdeacon*, 82 Ill. 236. 1876.

§ 33. Agent charged with duty of settling a loss as a necessary incident has power to dispense with those conditions of the policy which have reference to the mode of ascertaining liability and limiting right of action. *Little v. Phoenix Ins. Co.* 123 Mass. 380. 1877.

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§ 34. Statement made by local agent after fire to assured that the company would regard the loss as an honest one and pay, does not amount to a waiver of any of the company's legal rights. *Card v. Phoenix Ins. Co.* 4 Mo. App. 424. 1877.

§ 35. A delay of 45 days in making objection to proofs at which time it would be too late to complete the proofs and retain the right of action under the policy, *Held*, evidence of waiver. *Hibernia Mutual Fire Ins. Co. v. Meyer*, 10 Vroom, N. J. L. R. 482. 1877.

§ 36. Policy is voidable at option of the company, and does not become absolutely void upon the happening of facts which may work a forfeiture. If the company with knowledge of such facts after a loss subjects the assured to further expense and delay after his proofs are once furnished it estops the company from insisting upon a forfeiture. *Semble*, that constructive notice to the company of facts which might be claimed to effect a forfeiture is sufficient. *Gans v. St. Paul Fire Ins. Co.* 43 Wis. 108. 1877. See §§ 48, 52.

§ 37. When a local agent during the continuance of the policy is informed of a proposed change of tenants, and that the former tenant had quit possession, and he replies that it is "all right," there is a waiver of the condition in regard to occupancy. *Palmer v. St. Paul Fire Ins. Co.* 44 Wis. 201. 1878.

§ 38. Where no word or act has been said or done to mislead the insured or throw him off his guard, mere silence is not enough to infer waiver. *Mueller v. Southside Fire Ins. Co.* 87 Pa. 399. 1878.

§ 39. When defendant had consented to other insurance in a certain company, both policies being issued by the same agent, and subsequently another policy is substituted in the place of the second and no consent of defendant is indorsed upon its policy, such substitution being made with knowledge of defendant's agent, and no objection being made upon an attempted adjustment or before

action was brought, *Held*, a waiver of the objection that consent was not indorsed upon the policy. *Collins v. Ins. Co.* 79 N. C. 280. 1878.

§ 40. The authority of a president of an insurance company to receive notice will not be presumed to sustain a waiver. *Ins. Co. v. Lewis*, 48 Tex. 622. 1878. *Texas Ins. Co. v. Stone*, 49 Tex. 4. 1878.

§ 41. Policy is voidable at option of insurance company, which cannot sleep upon its intention to avoid the policy to the prejudice of the assured. The forfeiture may be waived by laches of the company misleading persons interested in the policy to their prejudice. *Appleton Iron Co. v. British America Assurance Co.* 46 Wis. 23. 1879.

§ 42. The issuing of a policy when a portion of the questions in the application remain unanswered is a waiver of answer to such questions. *Armenia Ins. Co. v. Paul*, 91 Pa. 520. 1879.

§ 43. Knowledge of facts constituting forfeiture is essential to effect a waiver of it by any act or declaration on the part of the company. *Ryan v. Springfield Fire Ins. Co.* 46 Wis. 671. 1879.

§ 44. *Semble*, that where condition requires written consent, to be operative it must be shown that assured had knowledge of facts requiring such consent. *Green v. Homestead Fire Ins. Co.* 17 Hun, 467. 1879.

§ 45. Assured on asking for a renewal of his policy made known to agent of company facts which constituted a breach of conditions in it, and upon paying the premium received a renewal receipt, the agent stating that he would "make it all right." *Held*, to constitute a waiver; that policy continued valid for another term, notwithstanding clause requiring waiver to be evidenced by writing indorsed thereon. *Whited v. Germania Fire Ins. Co.* 76 N. Y. 415. 1879.

§ 46. Signing by a secretary of an order for payment of the adjustment of a loss with knowledge of the facts

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constitutes a waiver of a forfeiture. Farmers' Mutual Ins. Co. v. Gargett, 42 Mich. 289. 1879. And see Smith v. Glen's Falls Ins. Co. 62 N. Y. 85. 1875.

§ 47. Assured was notified by letter that it would be "necessary for him to furnish proofs of loss as required by conditions of the policy," and that the company claimed the policy to be void on ground of existence of other insurance not consented to. *Held*, that although assured was put to trouble and expense in the furnishing of proofs, company was not thereby estopped from insisting upon the forfeiture caused by the other insurance. Phoenix Ins. Co. v. Stevenson, 8 Ins. L. J. 922. 1879. Ky.

§ 48. The doctrine of waiver should not be extended so as to deprive a party of a defense merely because he negligently or incautiously when a claim is first presented, while denying his liability, omits to disclose the ground of his defense, or states another ground than that upon which he finally relies. There must in addition be evidence from which the jury would be justified in finding that with full knowledge of the facts there was an intention to abandon, or not to insist upon the particular defense afterward relied upon, or that it was purposely concealed under circumstances calculated to and which actually did mislead the other party to his injury. Devens v. Mechanics' and Traders' Ins. Co. 83 N. Y. 168. 1880. See § 52.

§ 49. Policy provided that the acts of the insurers in saving and preserving the property insured should not be considered as affirming or denying any liability under the policy. Company after a fire directed master of boat insured to store the anchors and other articles saved. *Held*, not to constitute a waiver of a breach of warranty in respect to requiring notification of time and place of boat being laid up. Devens v. Mechanics' and Traders' Ins. Co. 83 N. Y. 168. 1880.

§ 50. Company does not waive defense of breach of warranty by stating when it receives proofs that they consider they owe nothing as fire was caused by carelessness. The omission to put its disclaimer upon ground of breach

of warranty in answer to an inquiry as to amount due is not a waiver of such defense. *Devens v. Mechanics' and Traders' Ins. Co.* 83 N. Y. 168. 1880.

§ 51. Company does not waive defense of the existence of other insurance by refusal to pay, when demand is made, upon other grounds. *Galveston Ins. Co. v. Heidenheimer*, 9 Ins. L. J. 592. 1880. Texas.

§ 52. Where there has been a breach of condition company may or may not take advantage of such breach and claim a forfeiture. It may, consulting its own interests, choose to waive the forfeiture, and this it may do by express language to that effect, or by acts from which an intention to waive may be inferred, or from which a waiver follows as a legal result. A waiver cannot be inferred from its mere silence. It is not obliged to do or say anything to make the forfeiture effectual. It may wait until claim is made under the policy, and then in denial thereof or in defense of a suit commenced therefor allege the forfeiture. But it may be asserted broadly that if in any negotiations or transactions with the assured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the assured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is as matter of law waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel. *Earl J. Titus v. Glen's Falls Ins. Co.* 81 N. Y. 410. 1880. See § 48.

§ 53. Where company, with *knowledge* of the facts constituting breach of a condition, requires assured to submit to an examination, and he does so under clause in policy in reference thereto, it operates as a waiver of the forfeiture. *Titus v. Glen's Falls Ins. Co.* 81 N. Y. 410. 1880. *s. p. Northwestern Mut. Ins. Co. v. Germania Fire Ins. Co.* 40 Wis. 446. 1876.

§ 54. Knowledge of company of all the facts constituting a forfeiture, and its act or declaration with such knowledge, are essential to sustain a claim of waiver. *Fitchpatrick v. Hawkeye Ins. Co.* 53 Iowa, 335. 1880.

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§ 55. Company may refuse to pay without specifying any ground, and insist upon any available ground, but if they plant themselves upon a specified defense, and so notify the assured, they should not be permitted to retract after the latter has acted upon their position as announced, and incurred expenses in consequence of it. *Brink v. Hanover Fire Ins. Co.* 80 N. Y. 108. 1880.

§ 56. Delay and silence, assured being in no way harmed, do not justify an inference of waiver. *How v. Union Mutual Life Ins. Co.* 80 N. Y. 32. 1880.

§ 57. Assured may declare upon his policy as written, and if the company avers and proves breach of a condition assured may prove a waiver of it, without its being necessary to reform the policy. *Smith v. Commonwealth Ins. Co.* 49 Wis. 322. 1880.

See Adjustment, § 4. Agent, 22, 30, 35, 37, 44, 46, 50, 55, 70, 76, 84, 93, 99, 104. Alienation, 9, 38, 62, 68. Application, 3, 6, 7. Arbitration, 10, 11. Cancellation, 11, 12. Certificate, 14, 17. Construction, 9. Contribution, 19. Encumbrance, 7. Evidence, 12, 45, 47, 61. Examination, 4. Insurable Interest, 38. Lighting, 3. Limitation, 2, 4, 6, 7, 8, 18, 19, 22, 29, 30. Mutual Company, 1, 21, 25, 27, 63, 69, 83, 90, 96, 99, 105, 109, 111, 113, 115, 117, 138, 140, 149, 153. Notice of Loss, 6, 8, 9. Other Insurance, 5, 11, 35, 42, 51, 54. Parol Contract, 21, 83. Pleading and Practice, 12, 16, 21, 29, 30. Premium, 1, 3, 7, 10, 11, 16. Proofs of Loss, 1, 2, 5, 6, 7, 8, 10, 16, 19, 22, 26, 28, 30, 34, 35, 39, 40, 43, 44, 46, 47, 48, 49, 50, 53, 54, 55, 61, 62, 64, 65, 67, 68, 71, 79, 80, 81, 83, 86. Questions for Court and Jury, 1. Rebuild, 5. Renewal, 1, 9. Risk, 6, 20. Storing and Keeping, 13. Title, 36, 37, 50, 56. Use and Occupation, 7, 10. Valued Policy, 3. Vacant or Unoccupied, 8, 5, 36. Warranty and Representation, 27, 35, 40.

## WARRANTY AND REPRESENTATION.

§ 1. A verbal representation to vitiate a contract of insurance, must relate to some past or existing fact material to the risk ; if in the nature of a promise or stipulation for future conduct it must be inserted in the policy, or company cannot avail itself of it. Mayor of N. Y. v. Brooklyn Fire Ins. Co. 3 Abb. Ct. App. Dec. 251. 1868.

§ 2. Description of property insured as a "brick building," is not a warranty that the building is constructed entirely of brick. Gershauser v. N. B. & Mercantile Ins. Co. 7 Nev. 174. 1871.

§ 3. If there is any danger of incendiary fire, reasonably to be apprehended, known to the assured, it is his duty to state it in his application and inform company of it ; and if he answers falsely in that regard, and a loss ensues, company is relieved from liability. But such incendiary danger must be real and substantial, one that necessarily enhances the risk, one which a man of ordinary prudence and caution would regard as not mere idle talk or reports, which if the assured knew of, he might be excused from repeating to the agent. McBride v. Republic Fire Ins. Co. 30 Wis. 562. 1872.

§ 4. The question of materiality in case of misrepresentation as to title must be submitted to jury. Bellatty v. Thomaston Ins. Co. 61 Me. 414. 1872.

§ 5. A statement in policy that building is "occupied as a country store," is a warranty that the building was used at the date of the agreement for the purpose specified. Dewees v. Manhattan Ins. Co. 6 Vroom, N. J. L. R. 366. 1872.

§ 6. When property is insured as a dwelling-house, the fact that it is or was after the insurance occupied as a boarding-house does not constitute a breach of warranty. Planters' Ins. Co. v. Sorrels, 1 Baxt. 352. 1872.

§ 7. A warranty that stoves and pipes shall be kept well secured is not broken by a temporary removal of pipe at a time when stove is not in use. *Mickey v. Burlington Ins. Co.* 35 Iowa, 174. 1872.

§ 8. An answer "W. D." to question as to title cannot be held to mean "warranty deed" without extrinsic evidence, and even if so found it does not necessarily follow that it is equivalent to representation that assured owned property in fee. *Rockford Ins. Co. v. Nelson*, 65 Ill. 415. 1872.

§ 9. While a warranty relating to an existing fact must be literally true, or policy does not attach, that which is promissory in its nature is not so strictly construed. In latter case it is sufficient if *substantially* true or performed. *Cady v. Imperial Ins. Co.* 4 Cliff. 203. 1873. *s. p. James v. Lycoming Ins. Co.* Id. 272. 1874.

§ 10. Warranty was "that the forcing pump and hydrants should be kept in good working order; also a good supply of water casks and buckets in each room." *Held*, promissory in its nature, and no breach if *substantially* complied with, as by proof of the existence of the pump and hydrants and reasonable skill and care in keeping same in order, and by keeping the casks and buckets in an accessible place convenient for use, although in an adjoining connected room or entry. *Cady v. Imperial Ins. Co.* 4 Cliff. 203. 1873.

§ 11. Whatever is expressed, whether with perspicuity or obscurity, that is what is warranted. If there be latent ambiguity it may be removed by testimony. *Bryce v. Lorillard Fire Ins. Co.* 55 N. Y. 240. 1873.

§ 12. Policy insured merchandise "*contained in letter C*," Patterson Stores, South Front, below Pine street, Philadelphia." Patterson stores was a warehouse, divided into eight sections or buildings, being designated by the letters A, B, C, &c. The sections were divided from each other by substantial brick walls, with no communication between. The walls extended twelve inches above the

roof. At time of issue of policy and at time of fire the property was in fact in letter A and not in letter C. *Held*, description a warranty; that the latent ambiguity in use of the term "letter C" was removable by testimony; that there was a breach and there could be no recovery; that assured could not invoke the aid of the maxim "*falsa demonstratio non nocet*"; there must be in the description so much that is true, as that, casting out that which is false, there is still enough left to clearly point out the place in which is the property. *Bryce v. Lorillard Ins. Co.* 55 N. Y. 240. 1873. *s. p. Hartford Ins. Co. v. Farish*, 73 Ill. 166. 1874.

§ 13. A description of the place of deposit of personal property inserted in the policy is a warranty, and a condition precedent, not to be avoided by the fact that the truth of the description is not essential to the risk, nor an inducement for company to enter into contract. *Bryce v. Lorillard Fire Ins. Co.* 55 N. Y. 240. 1873.

§ 14. A statement that "there is \$4,000 insurance on the property now" does not constitute a warranty that it is upon the *interest* of the applicant and assured. If not expressly stated the interest insured may be shown by parol testimony. *Planters' Mut. Ins. Co. v. Deford*, 38 Md. 382. 1873. *s. p. Frederick Co. Mut. Ins. Co. v. Deford*, *Id.* 404.

§ 15. Policy contained provision that an overvaluation either in written application or otherwise should render it void. Assured stated in his written application that the value of the property was \$8,000 or more. Upon the trial he admitted that he knew it was worth at the time of his application not more than \$4,000. Its real value was then about \$3,000. *Held*, to constitute a breach of warranty; that the question of overvaluation in the application was not one to be submitted to the jury as a question of good faith or fraud. *American Ins. Co. v. Gilbert*, 27 Mich. 429. 1873.

§ 16. Policy provided that false representations by the assured of the condition, situation or occupancy of the

property, or any omission to make known any fact material to the risk, or an overvaluation or any misrepresentation whatever either in the written application or otherwise, shall render it void. *Held*, that the intent of the whole provision was to make all representations in legal effect warranties, breach of which to render policy void, whether material to the risk or not, while the mere suppression of or omission to state any other fact should only have that effect when the fact suppressed was one material to the risk. *American Ins. Co. v. Gilbert*, 27 Mich. 429. 1873.

§ 17. A representation that assured held building in fee is rendered false by the fact that he had a leasehold interest only and his right to remove the building cannot help the assured. *Stickney v. Niagara District Mut. Ins. Co.* 23 Up. Can. C. P. 372. 1873.

§ 18. If assured fairly represented what he honestly believed, it will not defeat the action where the statement of fact does not amount to a warranty. *Imperial Fire Ins. Co. v. Murray*, 73 Pa. 13. 1873.

§ 19. It is not necessary that a misrepresentation should be made with intent to defraud. The false representation of a material fact voids the insurance if policy is issued on faith of it whether the false representation was by mistake or designed. *Continental Ins. Co. v. Kasey*, 25 Grat. 268. 1874.

§ 20. Assured stated in his application that the property was not mortgaged, that he was the sole and undisputed owner of the property and that he owned the ground on which the building stood by contract. *Held*, that this must be construed as equivalent to a representation that no person other than himself had any substantial interest in the property, and it appearing that there was an interest or lien upon the premises in favor of the vendor to the amount of the unpaid purchase-money that there was a breach of warranty. *Hinman v. Hartford Fire Ins. Co.* 36 Wis. 159. 1874.

§ 21. An application made part of the policy contained "how often is account of stock taken, when was it last taken and what amount did it reach?" Answer: "Every three months; 1st January, 1872; \$4,000." Held, that this could not be construed as a warranty obliging the assured to take an inventory precisely upon the expiration of every three months. *Wynne v. Liv. Lond. & Globe Ins. Co.* 71 N. C. 121. 1874.

§ 22. Application being made part of policy both instruments must be construed together. *Edwards v Farmers' Ins. Co.* 74 Ill. 84. 1874.

§ 23. No part of an application can be regarded as a warranty unless made so by the contract of insurance. To do this the same stipulations must be inserted in the contract, or, if not so, the paper containing them must be referred to and adopted, so as to become part of the contract. *Owens v. Holland Purchase Ins. Co.* 56 N. Y. 565. 1874. *s. p. Co-operative Assoc. v. Leflore,* 53 Miss. 1. 1876. *Byers v. Farmers' Ins. Co.* 9 Ins. L. J. 743. 1880. Ohio.

§ 24. A warranty should be construed without reference to its effect upon the risk. *Schultz v. Merchants' Ins. Co.* 57 Mo. 331. 1874.

§ 25. Where an application, made a warranty, contained several answers to effect that "assured was the owner of the property, and that no other person was interested," and in response to a question as to encumbrances stated "held by contract," and it appeared assured was in possession under a contract of sale, Held, the several answers must be construed together, and that as plaintiff's interest was correctly stated, there was no breach. *McCulloch v. Norwood,* 58 N. Y. 562. 1874.

§ 26. Where distance between buildings is made a warranty, if actually less than stated, there is a breach. *Mamluk v. Franklin,* 65 N. Y. 556. 1875.

§ 27. Where company after a loss, in consideration of the surrender and cancellation of the policy, agrees to pay

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a certain amount, the action may be properly brought upon the new agreement, and hence the limitation clause, and, in the absence of fraud, a breach of warranty, are not available as defenses. And such is the case notwithstanding company does not know of the breach at the time of settlement. *Smith v. Glen's Falls Ins. Co.* 62 N. Y. 85. 1875. *Aff'g* 66 Barb. 556. *s. p. Ill. Mut. Ins. Co. v. Archdeacon*, 82 Ill. 236. 1876.

§ 28. The phrase "*on his building*," &c., is not a warranty of ownership, nor a material misrepresentation, assured being in possession. The words should be viewed as a description indicating the purpose of the parties and what property was in their minds. *Rohrbach v. Germania Fire Ins. Co.* 62 N. Y. 47. 1875.

§ 29. Application was made a warranty. In it assured stated that he had disclosed all the facts in relation to the property so far as the same were known to him. But in answer to the question, "Is your title to the property absolute? If not state its nature and amount;" the only answer given was, "His deceased wife held the deed." Assured in fact had only a written certificate signed by his wife, declaring she owed him so much money, and that the amount was a lien upon her property. *Held*, the application did not by its representations put defendant in possession of the exact facts of the case, and tended to mislead as to real situation of the property and the real interest of the plaintiff in it, and that it was, therefore, in this respect a warranty, and that there was a breach. *Rohrbach v. Germania Fire Ins. Co.* 62 N. Y. 47. 1875.

§ 30. Policy read after describing the property and its situation "per survey No. 18,611, filed in the office of the People's Insurance Company, New York." Such survey was actually filed as stated, and policy was issued upon faith of its statements. *Held*, that the survey was made part of the policy and a warranty. *Steward v. Phoenix Fire Ins. Co.* 5 Hun. 261. 1875.

§ 31. A statement in the policy that building insured is occupied as a hardware store and dwelling does

not warrant that it shall continue to be so used during the continuance of the policy. *Bryan v. Peabody Ins. Co.* 8 W. Va. 605. 1875.

§ 32. When policy provides that the existence of a certain fact shall render it void, the parties themselves by their contract make such fact material, and it is immaterial whether the fact was material to the risk or not, or whether its non-disclosure induced the company to issue the policy or not. *Beck v. Hibernia Ins. Co.* 44 Md. 95. 1875.

§ 33. To sustain defense of a fraudulent misrepresentation, it is not necessary that the company refund the premium. *Blaeser v. Milwaukee Mutual Ins. Co.* 37 Wis. 31. 1875.

§ 34. The knowledge of an agent, authorized to procure and submit applications, and to issue policies when signed by the proper officers of the company and transmitted to him, is immaterial in case of warranty, policy containing usual agency clause, and there being no fraud. *Rohrbach v. Germania Fire Ins. Co.* 62 N. Y. 47. 1875.

§ 35. A warranty and effect of breach thereof created by false statements in application cannot be altered by a verbal agreement with the agent at the time of obtaining the insurance. *Dingee v. Agricultural Ins. Co.* 3 Pugsley, N. B. 80. 1875.

§ 36. A representation of value must be considered a matter material to the risk. *Williamson v. Commercial Union Ins. Co.* 25 Up. Can. C. P. 453. 1875.

§ 37. All representations of assured contained in the policy by being written therein, or incorporated therein by reference are warranties, and must be substantially true or policy will be void. Questions of materiality, good faith, and knowledge of an agent, cannot affect the result. *Foot v. Aetna Life Ins. Co.* 61 N. Y. 571. 1875.

§ 38. The provision of the Mass. statute (1864, c. 196) that "the conditions of the insurance shall be stated in the body of the policy," is complied with by a state-

ment of substance of condition on face of policy, with distinct reference to schedules or details printed upon a subsequent page; a mere general declaration upon the face of policy that it is made and accepted in reference to conditions annexed, and that they are part of the contract is not sufficient. *Mullaney v. National Ins. Co.* 118 Mass. 393. 1875.

§ 39. When assured makes a written application for insurance containing false statements and material omissions, the fact that company's agent had knowledge also at the time does not prevent company from insisting upon a breach of warranty. *Shannon v. Gore District Mutual Fire Ins. Co.* 37 Up. Can. Q. B. 380. 1875.

§ 40. Policy contained usual clause providing that any person other than the assured procuring the insurance should be deemed the agent of the assured and not of the company. The application for the insurance was taken by one Brewster who was engaged in soliciting business, taking and filling out applications, receiving premiums, &c., for defendant. He was aware at time he took the application of a fact constituting a breach of warranty. *Held*, that his knowledge could not affect validity of the warranty, even assuming that he was defendant's agent for purpose of taking the application. *Alexander v. Germania Fire Ins. Co.* 66 N. Y. 464. 1876. *Rev'g 2 Hun*, 655.

§ 41. Knowledge of an agent does not relieve assured from consequences of a breach of warranty. *Barteau v. Phoenix Mut. Life Ins. Co.* 67 N. Y. 595. 1876.

§ 42. A warranty cannot be created or extended by construction. *Wilkins v. Ins. Co.* 30 Ohio, 318. 1876. *s. p. Planters' Ins. Co. v. Myers*, 55 Miss. 479. 1877.

§ 43. In case of an insurance upon a boat, a temporary deviation from a permitted course does not render the policy void so as to prevent a recovery for a loss happening subsequently. *Wilkins v. Ins. Co.* 30 Ohio, 317. 1876.

§ 44. A representation as to value of property in an application made a warranty, does not avoid it unless de-

signedly untrue. *Redford v. Mut. Fire Ins. Co.* 38 U.P. Can. Q. B. 538. 1876.

§ 45. If policy provides that if the statements in the application are untrue, their falsity in any respect shall avoid the policy, it removes the question of materiality from the consideration of the court or the jury. *Co-operative Association v. Leflore*, 53 Miss. 1. 1876.

§ 46. Mass. statute, 1864, ch. 196, provides that "the conditions of insurance shall be stated in the body of the policy, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty or a part of the contract, except so far as they are incorporated in full into the policy and so appear on its face." Policy contained following clause: "reference is had to application on file at this office, which is hereby made a part of this policy, and a warranty on part of the assured." *Held*, that company could not be permitted to defeat a recovery by treating the application as a representation. *Taylor v. Aetna Ins. Co.* 120 Mass. 254. 1876.

§ 47. In case of warranty, truth of the representation is a condition precedent to validity of policy, unaffected by knowledge of assured. *Merwin v. Star Fire Ins. Co.* 7 Hun, 659. 1876. Aff'd (without opinion), 72 N. Y. 603.

§ 48. A description of property insured as a "dwelling-house," constitutes a warranty. *Merwin v. Star Fire Ins. Co.* 7 Hun, 659. 1876. Aff'd (without opinion), 72 N. Y. 603.

§ 49. When an application, made a warranty, contains questions and answers, only such parts of the answers as are responsive are to be deemed warranties. When not responsive, but volunteered without being called for, they should be considered as mere representations, upon which no defense can be based unless material as well as false. *Buel v. Connecticut Life Ins. Co.* 5 Ins. L. J. 274. 1876. Wis.

§ 50. Policy read "on his two-story and extension frame, shingle roof building, occupied as dwelling, situate,

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&c." At time of its issue building was vacant. *Held*, that "occupied as dwelling" was a warranty, and the fact of unoccupancy constituted a breach which rendered policy void. *Alexander v. Germania Fire Ins. Co.* 66 N. Y. 464. 1876. *Rev'g 2 Hun*, 655.

§ 51. In case of warranty it is immaterial whether representations or statements were made in ignorance or fraudulently. *Baker v. Home Life Ins. Co.* 64 N. Y. 648. 1876.

§ 52. Breach of warranty cannot be based upon an overvaluation, unless shown to be intentionally excessive. *National Bank v. Ins. Co.* 5 Otto, 673. 1877.

§ 53. When assured signed a blank form of application, which was subsequently filled up by company's agent, without any knowledge or dictation of the assured, *Held*, that assured made no warranty thereby. *Sprague v. Holland Purchase Ins. Co.* 69 N. Y. 128. 1877.

§ 54. A warranty will not be extended to include anything not necessarily implied in its terms. *Dilleber v. Home Life Ins. Co.* 69 N. Y. 256. 1877.

§ 55. Description of a house insured as a dwelling is not a warranty that it is occupied as such, in absence of evidence showing misrepresentation or concealment. *Browning v. Home Ins. Co.* 71 N. Y. 508. 1877.

§ 56. Application made a warranty by reference in the policy, contained a clause to the effect that assured had given full and correct information, &c., so far as the same "*is known to the applicant and material to the risk.*" *Held*, that the clause in italics qualified the warranty, and that knowledge and materiality were essential elements of a breach. That policy could not be declared void on ground of an overvaluation in the application. *First National Bank v. Hartford Fire Ins. Co.* 7 Ins. L. J. 208. 1877. U. S. Circuit, Mo.

§ 57. Description of occupation in policy is a warranty that building is occupied as represented. If not so

occupied contract is violated the moment of its execution, and never becomes binding upon the company. Farmers' Ins. Co. v. Curry, 6 Ins. L. J. 733. 1877. Ky.

§ 58. Kentucky Act of 1874, which provides, in substance, that all statements and descriptions shall be held representations and not warranties, does not prevent parties to an insurance contract from stipulating otherwise. Farmers' Ins. Co. v. Curry, 6 Ins. L. J. 733. 1877. Ky.

§ 59. Words descriptive of present use will not be construed into a promissory stipulation that use shall remain unchanged, unless intent of parties is clearly manifest. Hartford Fire Ins. Co. v. Smith, 3 Col. 422. 1877.

§ 60. Under the Georgia Code an application, although made a warranty, does not void the policy unless the variation changes the nature, extent, or character of the risk. Mobile Fire Dep. Ins. Co. v. Miller, 58 Ga. 420. 1877.

§ 61. A statute which provides that all statements or descriptions in an application "shall be deemed and held *representations* and not *warranties*," does not prevent parties from *contracting* otherwise. When parties by their contract stipulate that parts of it shall have a construction and effect different from what the law would give but for their contrary declaration in the contract itself, it ought to be interpreted by the courts as they have contracted it shall be interpreted. Farmers' Ins. Co. v. Curry, 13 Bush (Ky.), 312. 1877.

§ 62. The words "his" or "their" used in a policy, as descriptive of the property of the assured, do not render policy void if insured has an insurable interest, although such interest may be a qualified or defeasible, or even an equitable interest. Fowle v. Springfield Ins. Co. 122 Mass. 191. 1877.

§ 63. If application is made a warranty, and contains clause "that the foregoing is a just, full, and true, exposition of all the facts and circumstances in regard to the

condition, situation, value, and risk of the property to be insured, *so far as the same are known to the applicant and are material to the risk*," the words italicised limit what precedes, and knowledge and materiality are proper questions for the jury. *Kerr v. Hastings Mutual Ins. Co.* 41 Up. Can. Q. B. 217. 1877.

§ 64. A warranty may be created by reference to an application made to another company, if such be the intention of the parties. *Whitlaw v. Phoenix Ins. Co.* 28 Up. Can. C. P. 53. 1877.

§ 65. Assured cannot defeat a written representation in warranty by a simple denial on his part that it was in fact made. Evidence that the application was never read to him is not allowed to vary the legal effect of the contract. *Southern Mutual Ins. Co. v. Yates*, 28 Grat. 585. 1877.

§ 66. A representation of ownership is not rendered false by the existence of an equitable title. *Farmers' Mutual Fire Ins. Co. v. Fogelman*, 35 Mich. 481. 1877.

§ 67. When policy contains a provision that any untrue statement shall avoid it, it is vitiated by any false statement of fact, whether material or not. *Farmers' Ins. Co. v. Curry*, 6 Ins. L. J. 733. 1877. Ky.

§ 68. A representation that other companies upon the same risk, had reduced the rate of premium, is no ground for evading the policy if company has already accepted the risk upon its own judgment, such misrepresentation having the effect only of inducing them to take a lower rate of premium. *Canada Fire Ins. Co. v. Northern Ins. Co.* 2 Tupper, 377. 1878.

§ 69. When condition provides that "if the assured shall cause the property to be described in the policy otherwise than it really is, so that a lower premium shall be charged, the policy shall be of no force." To accomplish such result the misrepresentation must have been operative to cause the insurance to be effected at a lower premium than it otherwise would be subject to; and that

question is properly left to the jury. Franklin Fire Ins. Co. v. Martin, 11 Vroom, N. J. L. R. 568. 1878.

§ 70. A false representation cannot be predicated upon an expression of opinion by a broker. Jury were charged that if representation made by broker was an expression of opinion and not a positive statement of fact, plaintiff was entitled to recover. *Held*, correct. Standard Oil Co. v. Amazon Ins. Co. 14 Hun, 619.

§ 71. Description of use and occupation in a policy is a warranty. Franklin Fire Ins. Co. v. Martin, 11 Vroom, N. J. L. R. 568. 1878. Texas Ins. Co. v. Stone, 49 Tex. 4. 1878.

§ 72. Policy insured plaintiff "on his frame dwelling-house." The answer in substance alleged that the plaintiff agreed and warranted that the building was and should be occupied as a dwelling-house, and for no other purpose, and that plaintiff used and occupied the building at the time he procured the policy and afterward, as a boarding-house and hotel, and that policy was thereby rendered void. No change in occupation was alleged. Evidence offered that the building, after the date of the policy, was occupied as a hotel without the consent of the defendant. *Held*, that such evidence was properly excluded under the issue as created by the answer. That if defendant had wished to avail itself of defense founded on an increase of risk, it should have been properly pleaded. Pierce v. Cohasset Mut. Fire Ins. Co. 123 Mass. 572. 1878.

§ 73. No technical words or form of expression are necessary to constitute a warranty. Words of affirmation or statements imputing conditions or undertaking on the part of the assured relating to a risk or affecting its character or extent, upon which it must be inferred the insurer contracted, will ordinarily be construed and held to be a warranty. Texas Ins. Co. v. Stone, 49 Tex. 4. 1878.

§ 74. Policy "warranted a family to live in said house throughout the year." Trial court was asked by defendant, upon plaintiff's evidence, to charge the jury that "the oc-

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cupation of the premises by two hired men in plaintiff's employ, who took their meals and were employed during the day on other premises, but slept in the insured premises at night, assured and his wife and children being absent, was not such an occupation of the premises as complied with the warranty," which was refused. *Held*, error; that court should have charged as requested, and that the evidence did not sustain finding by jury of compliance with the warranty. *Poor v. Humboldt Ins. Co.* 125 Mass. 274. 1878.

§ 75. Property was described in the policy as *his* (the assured's) property. Proof was that the insured had contracted to purchase the property, and had paid all of the purchase-money except \$2,000; that by his solicitation a third party advanced for him that amount and the conveyance was made by the owner to such party who gave to the assured an agreement in writing to convey to him on repayment of the sum advanced; that the assured had repaid the money advanced before the policy was issued, and had been in the exclusive possession and control of the property from the time of the conveyance to such third party, and had expended a considerable sum in improvements. *Held*, that the insured had an insurable interest, and that by the description of the property as "his," there was no such misrepresentation or breach of warranty as to avoid the policy, there being no condition in it requiring the true state of the title to be disclosed. *Franklin Fire Ins. Co. v. Martin*, 11 Vroom, N. J. L. R. 568. 1878.

§ 76. Misrepresentation is not available as a defense when the company at the time has knowledge of the facts. A different rule prevails with respect to warranty, in which case if there is any fact not complied with the contract falls without regard to the knowledge of the company. *Franklin Fire Ins. Co. v. Martin*, 11 Vroom, N. J. L. R. 568. 1878.

§ 77. Warranties must be true at the time of the delivery of the policy. *Blumer v. Phoenix Ins. Co.* 45 Wis. 622. 1878.

§ 78. When application, made a warranty, contains a question as to whether there was any danger of an incendiary fire which is answered in the negative, and the evidence on the trial shows the answer to be untrue, plaintiff cannot recover. *Herbert v. Mercantile Fire Ins. Co.* 43 Up. Can. Q. B. 384. 1878.

§ 79. Policy read "as per application on file, No. 1234." No such application was ever sent to defendant, or was on file in its office. It appeared that an application of that description, signed by plaintiff, was on file with defendant's agent, who issued policy in suit, and that it was sent to same agent in regard to another application made some time previously, upon which a policy was issued by another company, which had expired, and in place of which policy in suit was issued. Upon back of the application was a diagram, assumed to have been made by the agent, showing location of building insured. The only application made by assured was by a letter requesting insurance in good company without any reference to previous application. Reference in policy appeared to have been made by the agent upon his own motion. *Held*, that there was no warranty created; and that even if application could be regarded as obligatory, the diagram, not purporting to have been made by assured, and there being no proof that he ever saw or had anything to do with it, was not binding. *Vilas v. N. Y. Central Ins. Co.* 72 N. Y. 590. 1878. Aff'g 9 Hun, 121.

§ 80. Application was made a warranty and contained the following: "*Q.* What is your title to, or interest in, the property? *Ans.* Deed." *Held*, that the answer did not import an unqualified grant in fee of a freehold estate; that any interest, having its origin in a deed, and based primarily upon it, would prevent answer from being regarded as untrue so as to constitute a breach of warranty. *Merrill v. Agricultural Ins. Co.* 73 N. Y. 452. 1878. Aff'g 10 Hun, 428. s. p. *Dacey v. Agricultural Ins. Co.* 21 Hun, 83. 1880.

§ 81. Application made a warranty contained following: "Is property encumbered; if so, state amount?"

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*Ans.* No morg judgment." At time of issue of policy there were nine judgments against the assured. Company claimed answer to mean "no mortgage and no judgments." The assured, on the other hand, claimed that it meant "no mortgage but judgments." Testimony that company's agent was correctly advised of the facts and had erroneously written the answer, was excluded. *Held*, error; that the answer was, at least, ambiguous, and that the testimony, if it had been received, might have satisfied the trial court that the claim of the assured was correct, and if so, it would have comported with the answer assured alleged he gave. *Smith v. Farmers' Ins. Co.* 8 Ins. L. J. 828. 1879. Pa.

§ 82. Application was made a warranty. It contained a question as follows: "Title. Is your title to or interest in this property absolute; if not, state its nature and amount, name interest and amount of others concerned?" *Ans.* "Yes." In fact, the assured had no absolute inheritable interest. He was neither a tenant in common nor an ordinary joint tenant. It was held by him and his wife under same deed, and upon his death went by survivorship to his wife. *Held*, that policy was avoided by the false statement in regard to title. *Aetna Ins. Co. v. Resh*, 40 Mich. 241. 1879.

§ 83. Application contained question whether the stoves, funnels, flues, &c., employed for heating or using fire, are properly secured, to which the answer was "none." *Held*, that the word *none* meant that there were no stoves, funnels, flues, &c., employed for heating or using fire, and not that there was no stove on the vessel, used or unused. *Lyon v. Stadacona Ins. Co.* 44 Up. Can. Q. B. 472. 1879.

§ 84. A warranty that the adjoining buildings within eight rods are used for the purpose of a private dwelling, the survey on back of the application showing a vacant lot between the property insured and a neighbor's house, and no mention being made in the application or survey of a carpenter shop, when, in fact, a carpenter shop stood directly in the rear of the house in very close proximity

to it. *Held*, that there was a breach of the warranty, and that the legal effect of such breach in the voidance of the insurance was not removed by the fact that the shop had ceased to be used as a shop before the insurance, and was to be removed and used as a dwelling, which was done soon after the insurance was obtained. *Pottsville Mut. Fire Ins. Co. v. Horan*, 89 Pa. 438. 1879.

§ 85. When policy covers specific amounts upon the building and personal property, a breach of warranty in connection with the building only avoids the entire policy. *Schumitsch v. American Ins. Co.* 48 Wis. 26. 1879.

§ 86. A false statement in relation to encumbrance made a warranty, is a breach thereof and avoids the insurance. *Schumitsch v. American Ins. Co.* 48 Wis. 26. 1879.

§ 87. Creation of a warranty does not depend upon the use of that word. *Redman v. Hartford Fire Ins. Co.* 47 Wis. 89. 1879.

§ 88. Application made a warranty contained the following: “*Q.* What material is used for lubricating or oiling the bearings or machinery? *A.* Lard and sperm oil. *Q.* Is the machinery regularly oiled; if so, by whom and how often? *A.* Yes; by engineer and miller, as often as necessary.” During the continuance of the policy an oil known as “engine oil” was constantly used for oiling purposes, and the machinery was not usually oiled by the engineer or miller, but by another person specially employed by the assured for that purpose. Application also contained a clause that it contained a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property, so far as the same are known to the applicant and are material to the risk. *Held*, that the last clause qualifies and limits that which precedes, and that the contract could not be declared void unless it was made to appear not only that the application contained some false statements of facts, but that the insured knew it to be false, and that the same was material to the risk, and so far as any promissory or continuing statement or undertaking was con-

anted, true when made but afterwards departed from, it must appear that the change increased the risk. *Redman v. Hartford Fire Ins. Co.* 47 Wis. 89. 1879.

§ 89. Application made a warranty contained question as follows: "Is your property encumbered, by what, to whom, and what amount?" *Ans.* "Vendor's lien of about \$3,500." The wife of the vendor had a contingent right of dower in the property. *Held*, that this was not such an encumbrance as to constitute a breach of warranty, and policy cannot be avoided upon the ground of concealment or omission to state such fact. *Southern Mut. Ins. Co. v. Kloeber*, 31 Grat. 739. 1879.

§ 90. When a question in an application calls for title or interest, and the answer is "fee simple," made a warranty the fact that the wife of the assured's vendor has a contingent right of dower, does not constitute a breach. *Southern Mut. Ins. Co. v. Kloeber*, 31 Grat. 739. 1879.

§ 91. Policy contained provision as follows: "Assured hereby covenants that the representation given in the application for this insurance contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, and that if any material fact or circumstance shall not have been fairly represented," it shall be void. Upon the trial the judge instructed the jury, that if the representations in regard to the painting insured were falsely and fraudulently made and relied on by the insurer, and were untrue, it would void the policy, and that mere expressions of opinion and belief were not to be taken as misrepresentations of fact. *Held*, no error. *Wood v. Firemen's Ins. Co.* 126 Mass. 316. 1879.

§ 92. A representation that there is a solid brick fire-wall between each store in the building is one material to the risk. *Sowden v. Standard Ins. Co.* 44 Up. Can. Q. B. 95. 1879.

§ 93. Assured is not bound by a statement which he did not make and did not intend to make, but which he

was induced to sign by the fraud of company's agent. In such case the assured may show the facts by parol evidence, and prevent the effect of a breach of warranty. *Eilenberger v. Protective Mut. Fire Ins. Co.* 89 Pa. 464. 1879.

§ 94. When application made a warranty contains a statement that property is encumbered to the amount of \$2,000, when, in fact, there is a mortgage of \$3,400, there is a breach avoiding policy by the terms of the contract. *Byers v. Ins. Co.* 35 Ohio, 606. 1880.

§ 95. Company cannot avail itself of any breach of warranty to defeat an action brought upon an agreement to pay the loss made after the loss has occurred, and after the company has had opportunity to investigate the facts and circumstances without any interference, deception or fraud practiced by the insured at the time of the investigation. *Stache v. St. Paul Fire Ins. Co.* 49 Wis. 89. 1880. *s. p. Smith v. Glen's Falls Ins. Co.* 62 N. Y. 85.

§ 96. The application for a renewal, without notice of any change in the risk, is, in legal effect, a warranty on part of assured that no change, substantially increasing the risk, has taken place, policy containing usual condition in regard to renewal. *Brueck v. Phoenix Ins. Co.* 21 Hun, 542. 1880.

§ 97. A broker applied for insurance with a paper in his hand which he used in describing the risk and answering questions. The president, to whom the application was made, asked for a copy of this paper, which had been made by the broker two years previously to obtain insurance upon the same risk from another company. It consisted of a plan, with statements in relation to the risk. Copy was accordingly sent to defendant and policy was issued, which stated situation, &c., "as per plan filed in office of M. P. Rollins (the broker), a copy of which is filed, No. 168,732, in this office." Policy provided that "the application, survey, plan or description of property referred to in this policy, shall be a warranty, &c." A force pump was shown upon the plan so referred to. *Held*, that the application was oral; that the reference to

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the plan did not make it a warranty in reference to the pump. That the reference to the plan was like the ordinary reference in a deed for the purpose of identifying the subject-matter, and has a similar meaning. *Albion Lead Works v. Williamsburg City Ins. Co.* 9 Ins. L. J. 435. 1880. U. S. Circuit, Mass.

§ 98. Party in possession of insured premises under a valid subsisting contract of purchase is the equitable owner, and has an insurable interest, although he has not paid the whole consideration. He is not guilty of misrepresentation, if he represents the house as *his*, and there is no breach of warranty if house is described in policy as "his dwelling-house." *Rumsey v. Phenix Ins. Co.* 17 Blatch. 527. 1880.

§ 99. Representation was that the mortgage was only \$2,000. The truth was that it was \$3,440, including \$240 of accrued interest. *Held*, a representation material to the risk. *Byers v. Farmers' Ins. Co.* 9 Ins. L. J. 743. 1880. Ohio.

§ 100. Application made a warranty contained the following question and answer: "For what purpose used. State fully? *Ans.* Dwelling." *Held*, that the question did not call for the present as distinguished from the appropriate use of the building. That the answer was descriptive, not of any present occupation or actual use, but simply of the class or character of the building. *Woodruff v. Imperial Fire Ins. Co.* 83 N. Y. 133. 1880.

§ 101. A representation as to a mortgage made a warranty if untrue avoids the policy, and it is not proper to leave question of materiality to the jury. *Marshall v. Times Fire Ins. Co.* 4 Allen, N. B. 618. 1860. s. p. *Byers v. Farmers' Ins. Co.* 9 Ins. L. J. 743. 1880. Ohio.

§ 102. A false representation of encumbrance by mortgage upon the property insured is material to the risk. *Ryan v. Springfield Fire Ins. Co.* 46 Wis. 671. 1879. *Byers v. Ins. Co.* 35 Ohio, 606. 1880.

§ 103. When wife insuring her own building in which she lived and controlled, and regarded herself as did the agent of the company, as the owner of the household goods, her representation as to the latter, although not in a legal sense true, *Held*, not material to the risk. *Continental Ins. Co. v. Ware*, 9 Ins. L. J. 519. 1880. Ky.

§ 104. Application made a warranty contained the following: "Is there any encumbrance by mortgage or otherwise, and for what amount?" "Ans. Yes, \$2,500." Policy was dated March 6, 1876. The mortgage was for \$2,500, and all the interest due had been paid; but the interest thereon running from December 27, 1875, was unpaid. *Held*, that the representation as to amount was substantially true, and that there was no breach of warranty. *Titus v. Glen's Falls Ins. Co.* 81 N. Y. 410. 1880.

§ 105. By Mass. statute (L. 1864 c. 196) warranty cannot be created by a reference in policy. The statements or representations relied upon must be stated in body of policy. *Wheeler v. Watertown Fire Ins. Co.* 10 Ins. L. J. 354. 1881. Mass.

§ 106. A statement in policy that building is used for storage of ice is not a warranty that ice is there stored when policy is written. *Dolliver v. St. Joseph Fire Ins. Co.* 10 Ins. L. J. 380. 1881. Mass.

§ 107. Knowledge by the company or its agent and the assured of the breach of a warranty at time it is made, does not relieve the assured from the consequences of the breach, and is no basis for reformation of the policy, unless there be a mutual mistake as to facts. The purpose in requiring a warranty is to dispense with inquiry and cast upon the assured the obligation that the facts shall be as represented. That which is a warranty in a policy cannot be shown by parol evidence to have been inserted by mistake. Where the answer in a written application, and a warranty, is written by agent as made, there is no mutual mistake and no relief for assured, unless agent is guilty of fraud in deceiving him into making it. *Commonwealth Fire Ins. Co. v. Huntzinger*, 10 Ins. L. J. 618. 1881. Pa.

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§ 108. Assured was bound by terms of the policy to "use only lard and tallow, or sperm or lard oils for lubricating, and to keep a force-pump on the premises, with a proper supply of good hose on hand." *Held*, that to make a forfeiture the breach must be a substantial one. That if the assured, in usual course of business, ordered lard and sperm oil for lubricating purposes, and believed they obtained and were using what they ordered, and if the oil used contained lard and sperm oil and (although compounded with a product of petroleum) was equally as good and safe as pure lard and sperm oil, there is no substantial breach of the condition as to lubricators. That the question as to whether there was a proper supply of hose or not, should be submitted to the jury. *Copp v. German American Ins Co.* 51 Wis. 637. 1881.

§ 109. Statement in policy that building is "situate detached 100 feet" is a warranty that it is distant 100 feet from any building. *Burleigh v. Gebhard Ins. Co.* 12 N. Y. Weekly Dig. 235. 1881.

See Agent, § 101. Application, 8, 18. Cancellation, 22. Description, 4. Encumbrance, 21. Estoppel, 12, 14, 23. Fraud and False Swearing, 4. Mutual Company, 111. Other Insurance, 37. Overvaluation, 3. Pleading and Practice, 4, 15, 29, 31. Questions for Court and Jury, 8, 4, 17. Reformation, 11. Risk, 8, 12, 13, 20, 24. Title, 8, 43, 44, 50. Usage and Custom, 10. Waiver, 49, 50. Watchman.

## WATCHMAN.

§ 1. Survey was made part of policy and contained the following: "Watchman. Is one kept in the mill or on the premises during the night and at all times when the mill is not in operation, or when the workmen are not present? Ans. Yes." Upon the day previous to destruction of the property by fire, the sheriff levied an execution against the assured upon the personal property in the building (mill), and excluded their employees therefrom, took the keys and locked up the building. The deputy sheriff and one of the trustees of the assured remained in the office of the company, a building about two rods from the mill, during the night and until discovery of the fire. *Held*, survey to be a warranty and that there was a breach. That the levy did not affect the obligation to perform the warranty, and that the sheriff and trustee were not watchmen within the meaning of the warranty. First Nat. Bank of Ballston v. Ins. Co. of N. A. 50 N. Y. 45. 1872.

§ 2. The distillery premises insured consisted of the distillery, the bonded warehouse, scales, corn-crib, cooper-shop, two tenement-houses, an office 179 feet from the distillery, where grain was purchased, books kept, and the general business transacted. The office was not covered by the policy, but was known, used and recognized as part of the distillery property. Plaintiff had a day and night watchman. The night man usually occupied the office. On night fire occurred he was around the premises until about eleven o'clock, when he went into the office and went to sleep. Between one and two o'clock he discovered the fire. Clause in policy as follows: "a watchman to be on the premises." *Held*, a substantial and sufficient compliance with terms of contract in reference to watchman. Andes Ins. Co. v. Shipman, 77 Ill. 189. 1875.

§ 3. Application made a warranty, contained the following: "Is there a watchman kept on the premises at

night and at all other times when works are not in operation, or when the workmen are not present? Ans. Yes." *Held*, to be a continuing representation, and that the watchman being withdrawn several weeks prior to fire constituted a breach of warranty. *Whitlaw v. Phoenix Ins. Co.* 28 Up. Can. C. P. 53. 1877.

§ 4. A warranty is as much controlled by conditions in the policy as a representation; and if by its conditions the parties have agreed that alterations to avoid the insurance must be within the control or with the knowledge of the assured, and such control or knowledge must be shown as an essential element of a breach of warranty in relation to a watchman who by the terms of the application made a warranty was kept upon the premises, but had been withdrawn a short time previous to the fire. *Worswick v. Canada Fire Ins. Co.* 25 Grant Ch. 282. 1877.

§ 5. Application made a warranty contained the following: Q. "Is there a watchman in the mill during the night; is the mill ever left alone?" to which the answer was, "no regular watchman, but one or two hands slept in the mill. *Held*, that this was equivalent to an undertaking by the assured that one or two of his employees lodged in the mill each night, although they were not regular watchmen, and further that the same was a promissory and continuing undertaking which bound the assured to a substantial compliance with its terms from the time the policy was delivered until the mill and machinery were burned. *Blumer v. Phoenix Ins. Co.* 45 Wis. 622. 1878. Id. 48 Wis. 535. 1879.

See Agent, § 85. Questions for Court and Jury, 4.

## WHAT PROPERTY IS COVERED BY POLICY.

§ 1. Policy covering oil, "his own, in trust or on consignment," covers loss upon oil in warehouse for which warehouse receipts had been given in favor of one Ruston, and by him assigned to the assured and upon which the assured had made advances to Ruston. *Stanton v. Aetna Ins. Co.* 17 L. C. Jurist, 281. 1872.

§ 2. Cotton was stored in warehouse at various intervals, factor receiving for each lot deposited warehouse company's receipt specifying number of bales, date, and mark on bales. These receipts were numbered; that for a deposit on 20th June, 1,221, and on 27th June, 1,238. Policies of insurance were at once taken out to cover particular number of bales deposited, loss being made payable to warehouse company as security for money advanced. On one policy was indorsed in pencil in figures, 1,221, and upon the other, 1,238. *Held*, that the insurance was specific and was intended to cover only the specific number of bales in each deposit. *Hough v. Peoples' Ins. Co.* 36 Md. 398. 1872.

§ 3. Policy insured a frame steam saw mill and a specific amount on "boiler, engine, machinery, and belting contained therein." There was a planing machine in the mill in a shed, on the same floor with the machinery proper of the saw mill, about twenty-five or thirty feet distant, but connected with it by belting and plainly visible. Company's agent, previous to issue of policy, inspected the premises with a view to insuring. *Held*, that the planing machine was included in the term "machinery," as used in the policy. *James River Ins. Co. v. Merritt*, 47 Ala. 387. 1872.

§ 4. Property was described as "contained in the frame building known as the Hunt Building, situate in Northhampton, as per plan." At time policy was issued,

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the main floor was divided into three stores, as shown on the plan, assured occupying the west store, the others by other persons. At time of fire assured occupied the whole floor, having removed the partitions. Company contended that policy covered goods in west store only. It was not shown or claimed that there was any increase of risk. *Held*, that language of policy included all three of the stores; that reference to the plan was for the purpose of showing situation of building in reference to other buildings, and that assured was entitled to recover for all loss of or injury to goods, in any part of the building. *Fair v. Manhattan Ins. Co.* 112 Mass. 320. 1873.

§ 5. A company is liable for loss of a horse, although acquired after date of policy, which insured "live stock," &c. *Mills v. Farmers' Ins. Co.* 37 Iowa, 400. 1873.

§ 6. Policy insuring a railroad company upon its wood and logs cut and piled along its line, does not cover and include such property belonging to other persons, and set on fire by sparks from the locomotives, and to whom the railroad company has paid the value of such property, it being liable therefor. *Monadnock R. R. Co. v. Manufacturers' Ins. Co.* 113 Mass. 77. 1873.

§ 7. Where statement in proofs was "stock in tan-  
nery, hides and leather, \$56,500," it was held error to as-  
sume that it referred exclusively to hides and leather.  
*Planters' Mut. Ins. Co. v. Deford*, 38 Md. 382. 1873.

§ 8. The word "machinery" covers all instruments intended to be operated exclusively by machinery in business of assured, and which are so operated from time to time in regular and ordinary prosecution of the business referred to in the policy. Movable dies worked by a press, and when not in use deposited or kept on shelves apart from the press, may be included in the term machinery. *Searing v. Central Ins. Co.* 111 Mass. 540. 1873.

§ 9. Policy insured \$8,350 "on all or either of the freight buildings at Charlestown." One of them being burnt, *Held*, that company was liable for full amount of

the loss not exceeding the amount insured. Commonwealth v. Hide and Leather Ins. Co. 112 Mass. 136. 1873.

§ 10. Policy insuring "freight cars owned or used by the railroad company" covers cars of another road in possession and used of the assured. Commonwealth v. Hide and Leather Ins. Co. 112 Mass. 136. 1873.

§ 11. Policy insured "property in freight buildings." One of its terms provided that books and furniture "are not to be insured, unless by special agreement." There were books and furniture contained in the freight buildings and destroyed, but they were not specially insured. *Held*, that assured could not recover for books and furniture. Commonwealth v. Hide and Leather Ins. Co. 112 Mass. 136. 1873.

§ 12. Policy insured steam barrel factory, manufactured barrels and materials for the same therein. It contained provision that camphene or burning fluid, coal oil, petroleum, or any of their products by whatever name designated, unless otherwise specially provided for, if used company would not be liable for damages occasioned by such use. The assured, for the purpose of storing and painting empty barrels, used a certain portion of the property in which at the time of the fire was a barrel of benzine, conceded to be one of the products of petroleum, which was used in their business. *Held*, that the word "materials" could not be construed to cover the benzine in the absence of proof that it was usually or commonly used in the manufacture of barrels. The presumption as to knowledge of company of the use of an article in business insured extends only to such articles or materials as are necessarily and usually employed in connection with such business. McFarland v. Peabody Ins. Co. 6 W. Va. 425. 1873.

§ 13. A cellar wall is part of a building and covered by insurance of the latter. Ervin v. N. Y. Cent. Ins. Co 3 T. & C. (N. Y. Supr.) 213. 1874.

§ 14. Where policy covered "machinery" of a paper mill, *Held*, that the word was used in its most comprehen-

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sive sense and included all the machinery and the tools and implements used therewith in the manufacture of paper. *Buchanan v. Exchange Fire Ins. Co.* 61 N. Y. 26. 1874.

§ 15. Policy covered household furniture, beds, bedding, wearing apparel, and family stores. One clause in the policy provided that the company was not to be liable for loss on *plate* unless particularly specified. Certain silver forks, tea and tablespoons being destroyed by fire, and not being specified in the policy, company claimed that it was not liable for their loss. *Held*, that such claim was not well founded. *Hanover Fire Ins. Co. v. Mannasson*, 29 Mich. 316. 1874.

§ 16. Policy covered a certain amount on barn, live stock, and one item covered \$300 on grain in barn *or in stack*. Fire occurred by which wheat of the value of \$300 was destroyed, which was stacked upon land in the town of Chester, owned by the assured when the wheat was burned but not when the policy was issued. Application upon which policy was issued contained the following specifications: "In the town of Chester, county of Dodge, State of Wisconsin. Description of land on which buildings stand, Sec. 19, Town 13, Range 15." *Held*, that the contract in respect to the wheat in stack is not limited to that stacked within the curtilage of the buildings, nor to wheat grown on Sec. 19, nor yet to wheat grown or stacked on lands which plaintiff owned when the policy issued; but that it was in terms an agreement to insure against loss by fire to his wheat in stack in the town of Chester; that defendant was liable. *Sawyer v. Dodge County Mutual Ins. Co.* 37 Wis. 503. 1875.

§ 17. Policy covered grain, flour and fixtures consisting of working *tools*. *Held*, that paper bags were not covered by the term "tools." *Hutchinson v. Niagara District Ins. Co.* 39 Up. Can. Q. B. 483. 1876.

§ 18. Policy covering "stock of hair, wrought, raw, and in process," does not extend to fancy goods made of other materials, although such as are usually kept and sold

in a retail hair store. *Medina v. Builders' Mut. Ins. Co.* 120 Mass. 225. 1876.

§ 19. A heater, bricked in, is properly included in estimate of value of a building. *Adams v. Greenwich Ins. Co.* 9 Hun, 45. 1876. *Aff'd*, 70 N. Y. 166.

§ 20. The question whether "boots and shoes, hats and caps," are embraced in the term "dry goods," may be properly left to the jury, there being evidence of usage and custom and understanding of the term in trade. *Bassell v. American Fire Ins. Co.* 2 Hughes, 531. 1877.

§ 21. Policy insured "on risk of hay in haggard at rear, £400. On smaller risk of hay in said haggard, £200." *Held*, to apply only to specific risks existing at date of policy. *Gorman v. Hand-in-Hand Ins. Co.* Irish Rep. 11 C. L. 224. 1877.

§ 22. Policy on a "mill" covers both building and effects, and movable machinery in it. *Shannon v. Gore District Mutual Fire Ins. Co.* 2 Tupper, 396. 1878. *Rev'g 40 Up. Can. Q. B.* 188.

§ 23. Policy insuring "fixed and movable machinery, engines, lathes, and tools," covers wooden patterns which, from their size and shape, admit of being applied and managed by the hands of one man. And such patterns are covered, notwithstanding a clause excepting company from liability on "jewels, plate, watches, medals, patterns, sculpture, casts, models, or curiosities, unless particularly specified. *Lovewell v. Westchester Ins. Co.* 124 Mass. 418. 1878.

§ 24. Policy describing property as "his own or held by him in trust," covers a piano left with assured for sale or to rent. *Snow v. Carr*, 61 Ala. 363. 1878.

§ 25. Policy insured as follows: \$500 on their brick pottery building and ells, three stories with basement and flat roof; \$500 on machinery, shafting, belting, machines, and all implements used in their business; \$950 on stock in trade, consisting principally of earthenware, and on ma-

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terials for manufacturing the same; \$50 on office furniture, including safe, contained in said building, situate, &c. The factory consisted of two large three-story brick buildings, connected by a three-story wooden corridor six feet wide and fifteen feet long. One of these buildings was generally known as the pottery, and had three eells; the other was generally known as the storehouse. In course of manufacture the stock went to and fro from each of the buildings to the others several times. Some part of the process was conducted in the storehouse. *Held*, that the words "contained in said building," &c., applied to the machinery and stock as well as to the furniture; and that nothing was covered by the policy but the "pottery building" and its contents; that the storehouse was not included, the bill of exceptions admitting that the storehouse was a distinct building. *Hews v. Atlas Ins. Co.* 126 Mass. 389. 1879.

§ 26. The word *guano* may be shown to have been intended to cover and include *fertilizer*. *Planters' Mut. Ins. Co. v. Engle*, 52 Md. 468. 1879.

§ 27. Description of property as "frame building, occupied as a tannery," does not include engine and machinery. *Sunderlin v. Aetna Ins. Co.* 18 Hun, 522. 1879.

§ 28. Policy covered "electrotypes, steel plates and cuts." It was claimed that certain dies were covered by the terms used. *Held*, that jury should be instructed that when words have acquired an exact and technical meaning in any trade or business, and are used in contract relating to such business, *prima facie* they are to be construed in the meaning or sense which they have acquired in that business. It is error to charge jury that if words have both a technical meaning and an ordinary meaning they should determine in which sense the words were used. *Houghton v. Watertown Fire Ins. Co.* 10 Ins. L. J. 547. 1881. Mass.

§ 29. A policy obtained and held upon a stock of goods bequeathed to the assured by will, covers also additions to such stock made in the ordinary and usual

course of trade. *Butler v. Standard Fire Ins. Co.* 26 Grant Ch. 341. 1879. s. p. Policy covers additions to stock in ordinary course of business. *Bates v. Equitable Ins. Co.* 3 Cliff. 215. 1868. *American Cent. Ins. Co. v. Rothschild*, 82 Ill. 166. 1876. *Planters' Mut. Ins. Co. v. Engle*, 52 Md. 468. 1879.

See Agent, § 6. Assignment, 14. Evidence, 16, 25, 63. Goods in Trust, 1. Interest in Policy, 6. Parol Contract, 7. Questions for Court and Jury, 15. Risk, 8, 10, 15. Storing and Keeping, 6, 13, 14, 15, 23. Use and Occupation, 13.

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### WHO MAY SUE.

§ 1. When loss is made payable to a mortgagee, he may maintain an action in his own name, and is in legal effect the party insured. And he may also furnish the proofs required by the policy. *Brush v. Aetna Ins. Co.* 1 Oldright, N. S. 459. 1864.

§ 2. Where policy insures A., "his executors, administrators, and assigns," and assured has died previous to fire, action for the loss is properly brought in name of administrator. *Germania Fire Ins. Co. v. Curran*, 8 Kans. 9. 1871.

§ 3. It is not necessary to make one to whom loss is payable party to the action, which by his consent may be brought in name of assured. *Patterson v. Triumph Ins. Co.* 64 Me. 500. 1874.

§ 4. Party to whom loss is payable may maintain action in his own name. *Chamberlain v. Ins. Co.* 55 N. H. 249. 1875. *Hadley v. Ins. Co.* 55 N. H. 110. 1875. *Berthold v. Clay Ins. Co.* 2 Mo. App. 311. 1876. *State Ins. Co. v. Maackens*, 9 Vroom, N. J. L. R. 564. 1876. *Hartford Fire Ins. Co. v. Olcott*, 97 Ill. 439. 1881. See §§ 12, 14.

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§ 5. Part owner of property in whose name policy for account of all the owners is issued becomes trustee for such owners, and in case of loss may sue on the policy in his own name alone. *Knight v. Eureka Fire Ins. Co.* 26 Ohio, 664. 1875.

§ 6. An action may be maintained in the name of the assured, with or without consent of the person to whom the loss is made payable, where an insurable interest remains in such party; if in such a case if the company has paid the money to the mortgagee to whom the loss is payable, it may plead the payment as performance. *Martin v. Franklin Fire Ins. Co.* 9 Vroom, N. J. L. R. 140. 1875.

§ 7. Where it is understood by the parties that an insurance, although in the name of one, is effected in behalf of another and to protect his interest, the former is "trustee of an express trust" under Sect. 113 (now 449) of the Code, as being one "with whom a contract is made for the benefit of another," and action may be brought by him. *Pitney v. Glen's Falls Ins. Co.* 65 N. Y. 6. 1875.

§ 8. Where loss is made payable to mortgagee, the owner and assured is not a necessary party to an action. *Roussel v. St. Nicholas Ins. Co.* 9 Jones & Sp. 280. 1876.

§ 9. The owner of property consigned to factor who insured it *in his own name*, cannot maintain an action under the policy for recovery of the insurance. *Gordon v. Wright*, 29 La. Ann. 812. 1877.

§ 10. Policy for \$2,500 was payable to third parties to extent of \$1,400, as their interest might appear. Action was brought by assured, and a verdict was obtained for \$1,530. *Held*, that plaintiff was entitled to at least \$130 of the verdict, which was allowed to stand upon condition that releases should be obtained from the parties to whom loss was payable. *Deav v. Western Ins. Co.* 41 Up. Can. Q. B. 553. 1877.

§ 11. When the party insured retains by the terms of the policy itself, interest beyond the control of the mortgagee to whom loss is made payable, the latter cannot

maintain an action in his own name. *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609. 1877.

§ 12. Party to whom loss is made payable may sue for and recover the whole amount due under policy, holding residue over and above his own interest, as trustee for benefit of owner or others interested. *Dakin v. Liverpool, London, and Globe Ins. Co.* 77 N. Y. 600. 1879. *Aff'g 13 Hun, 122.* See §§ 4, 14.

§ 13. The assured and party to whom loss is made payable are properly joined as plaintiffs. *Lasher v. Northwestern Nat. Ins. Co.* 18 Hun, 98. 1879.

§ 14. Party to whom loss is payable may maintain action in his own name. *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121. 1878. *Bank of Hamilton v. Western Ins. Co.* 38 Up. Can. Q. B. 609. 1876. *St. Paul F. & M. Ins. Co. v. Johnson*, 77 Ill. 598. 1875. *Pitney v. Glen's Falls Ins. Co.* 65 N. Y. 6. 1875. *Turner v. Quincy Ins. Co.* 109 Mass. 568. 1872. *Contra, Maritime Bank v. Guardian Ins. Co.* 3 Pugsley & B. 297. 1879. See §§ 4, 12.

§ 15. When policy on building is made payable to mortgagee, and the assured being dead, action is brought by his administrator to use of the former, there is no force in the objection that the administrator cannot maintain action the title having descended to heirs of the assured. *Westchester Fire Ins. Co. v. Dodge*, 9 Ins. L. J. 909. 1880. Mich.

§ 16. When there is a question as to whether insurance money, the insured having died, should go to the administrator or to the heir, both may sustain a suit in equity to enforce the claim against the company. *Portsmouth Ins. Co. v. Reynolds*, 32 Grat. 613. 1880.

§ 17. Although insurance is obtained by a mortgagee upon his interest as such, if there is an agreement that such insurance shall be applied for the benefit of the owner and mortgagor and credited upon the mortgage, the mortgagor is the real party in interest, and the action

should be brought in his name. *Aetna Ins. Co. v. Baker*, 71 Ind. 102. 1880.

§ 18. It appeared upon face of the complaint, in an action brought by the mortgagee to whom the loss was made payable, that the mortgage debt was greater than the sum insured, which complaint being demurred to on the ground that mortgagor and assured should have been made a party, *Held*, that the mortgagor was not a necessary party, the demurrer admitting he had no interest. *Hammel v. Queen Ins. Co.* 9 Ins. L. J. 905. 1880. Wis.

§ 19. The assured W. H. Greene and Co. were indebted to E. A. Greene, and there was an understanding between them that the latter should have the benefit of policy in question. After loss latter wrote for the policy, and it was sent to him as his property in pursuance of such understanding to collect and apply the proceeds upon the indebtedness. At same time assured sent to E. A. Greene an order upon the company to pay the amount of the insurance to the latter. Suit was finally brought in Mississippi in name of the assured to use of E. A. Greene, and judgment was obtained against the company. Action was brought in New York upon the judgment in name of E. A. Greene as plaintiff. *Held*, that there was an assignment of policy to plaintiff, and being the owner of the judgment and real party in interest he could maintain action in his own name under provisions of New York Code. *Greene v. Republic Ins. Co.* 84 N. Y. 572. 1881.

§ 20. When fire is caused by wrongful or negligent act of a third party, the cause of action is indivisible. At common law action must be brought in name of the assured, and when rules of common law have been modified by Code or Statute, action may be brought in names of the companies and the assured jointly. *First Presbyterian Society et al. v. Goodrich Transportation Company*, 10 Ins. L. J. 452. 1881. U. S. Circuit, Wis. s. p. *Swarthout v. Chicago and N. W. R. R. Co.* 49 Wis. 625. 1880.

See Alienation, § 7, 22. Mortgagor and Mortgagee, 6, 13, 18, 25. Mutual Company, 7. Insurable Interest, 12. Interest in Policy, 5, 9, 18. Proofs of Loss, 36. Subrogation, 8, 11.



# SUPPLEMENT

CONTAINING THE LATEST REPORTED CASES TO 1882.

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## AGENT.

§ 1. Although a policy may be deemed to be without conditions, conditions indorsed not being in accordance with the statute, still the conditions may be considered in reference to company's intention as to authority of its agent. *Parsons v. Queens Ins. Co.* 29 Up. Can. C. P. 188. 1878.

See *Warranty and Representation*, § 7.

## ALIENATION.

§ 1. A condition against "change of interest" is violated by execution and delivery of a mortgage. *O'Neill v. Ottawa Agricultural Ins. Co.* 30 Up. Can. C. P. 151. 1879.

§ 2. Policy provided that "if property be sold or transferred, or any change takes place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, it should be void." Assured made a transfer by a sale under a deed of trust. *Held*, such a change in the title as to render policy void. *Commercial Union Ins. Co. v. Scammon*, 12 Rep. 745. 1881. Ill.

§ 3. Sheriff's deed on foreclosure of mortgage is such an alienation as avoids the insurance under a condition which provides that "if the property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance," policy shall be void. *Hagaman v. Allemania Ins. Co.* 10 Ins. L. J. 838. 1881. Pa.

See *Encumbrance*, § 2, 3. *Mutual Company*, 1.

**ALTERATION.**

See Increase of Risk, § 2.

**APPLICATION.**

§ 1. Covenants in application are no part of the insurance contract unless made part of policy by reference or incorporation. *Bergan v. Manufacturers and Merchants' Ins. Co.* 29 Up. Can. C. P. 414. 1878.

See Encumbrance, § 1. Title, 3.

**ARBITRATION AND APPRAISEMENT.**

See Waiver, § 4.

**ASSIGNMENT.**

See Waiver, § 2.

**CANCELLATION.**

§ 1. To sustain defense of cancellation company must show that assured had notice of the cancellation, and that the return premium was actually paid or tendered to him. *Runkle v. Citizens' Ins. Co.* 6 Fed. Rep. 143. 1881. U. S. Circuit, Pa.

§ 2. The power to cancel a policy cannot be delegated by an agent to another person; such person may however deliver the notice and pay or tender the return premium. *Runkle v. Citizens' Ins. Co.* 6 Fed. Rep. 143. 1881. U. S. Circuit, Pa.

**CERTIFICATE.**

§ 1. Policy provided that "assured shall also procure a certificate, under the hand and seal of a magistrate or notary public (nearest the place of fire, not concerned in the loss \* \* \*); that he has examined circumstances attending the loss \* \* \* and verily believes that assured has, without fraud, sustained loss to amount which such magistrate or notary shall certify. And until such certificate is furnished loss shall not be payable." Notary

who gave certificate in question had his office 25 rods from fire; his residence further. At same time Lloyd, a magistrate, had a place of business 8 rods from fire. Allen, another magistrate, 12 rods, and Pitkin, another, 15 rods. *Held*, that above clause was a condition precedent, and that it was not performed, as certifying notary was not the nearest, and company having plainly made and stated its objection to the certificate in due time, and assured having failed to furnish another certificate, he was not entitled to recover. *Gilligan v. Commercial Ins. Co.* 20 Hun, 93. 1880. Aff'd by N. Y. Ct. App. (without opinion) 24 Alb. L. J. 480.

See Waiver, § 3.

### CONCEALMENT.

§ 1. An omission to designate on a diagram buildings situated in immediate vicinity of property upon which the application for insurance is made is an "omission to make known facts material to the risk" within meaning of these terms as used in policy. *Gilligan v. Commercial Ins. Co.* 20 Hun, 93. 1880. Aff'd by N. Y. Ct. App. (without opinion) 24 Alb. L. J. 480.

See Warranty and Representation, § 7.

### CONSTRUCTION.

§ 1. Contracts of insurance are to be construed as other contracts. All parts of the contract are to be taken together; and they shall be liberally construed; and such meaning shall be given to them as will carry out and effectuate to the fullest extent the intention of the parties, and no portion of it shall receive such a construction as will tend to defeat the obvious general purpose of the parties entering into the contract. *Crane v. City Ins. Co.* 3 Fed. Rep. 558. 1880. U. S. Circuit, Ohio. s. p. Barber v. F. & M. Ins. Co. 16 W. Va. 658. 1880.

§ 2. Parties having expressly agreed upon terms of the contract, I am unable to see anything reprehensible in law or morals where a party insists upon all lawful conditions imposed by a contract to which both gave their

free assent. Parties make contracts for themselves, and, in the absence of fraud or mistake, it is right that due observance should be required of their lawful provisions. It does not lie with the court to relieve either because of an apparent hardship in the enforcement of terms and conditions, deliberately considered and expressly agreed upon. *Per Bockes, J. Gilligan v. Commercial Ins. Co.* 20 Hun, 93. 1880. *Aff'd by N. Y. Ct. App. (without opinion)* 24 Alb. L. J. 480.

§ 3. When an insurance company prints conditions of the insurance in very small type it leads to the inference that they do not mean them to be read. They may expect to encounter in such cases difficulty with courts and juries when they set up as a defense a breach of such conditions. Company relieves itself of such imputation and difficulty by printing at top of the indorsement on policy in large type, "Read the conditions of this policy." *Hagaman v. Allemania Ins. Co.* 10 Ins. L. J. 838. 1881. Pa.

#### CONTRIBUTION.

§ 1. Assured was in possession under contract of purchase. Defendant offered to prove that vendor had insured same property in another company, and had received a certain sum upon loss in suit and had credited it to plaintiff upon purchase price of property. Trial court excluded the evidence. Policy contained usual condition providing for an apportionment of the loss in case of other insurance. *Held*, error; that inference was that other insurance was effected for plaintiff's benefit, as well as to secure vendor for balance of purchase-money. Hence, if true, case was brought within operation of the condition, and evidence should have been received. *Bredow v. Erie Co. Mut. Ins. Co.* 13 N. Y. Weekly Dig. 211. 1881. N. Y. Sup.

#### DISTANCE BETWEEN BUILDINGS.

See Warranty and Representation, § 1, 5, 8.

## ENCUMBRANCE.

§ 1. Application contained following: "Incumbrances. Is the property mortgaged? If so, state the amount. Is there any insurance by the mortgagee? *Ans.* Yes, \$500 mortgage. Loss payable to Mr. G. as interest may appear." But there was no mention of another mortgage for \$1,000. This application was one of three made at same time, and although for insurance on different buildings they were all on same piece of land of about 4 acres. In one of the other applications assured in answer to similar question stated the correct amount of the mortgage incumbrance to be \$1,500. *Held*, no misrepresentation as to incumbrances, and that company had notice of the facts by the other application. *McGugan v. Manufacturers' & Merchants' Ins. Co.* 29 U. S. Can. C. P. 494. 1879.

§ 2. Consent to transfer and assignment with knowledge of a sale cannot be extended to include consent to the creation of an incumbrance by mortgage. *German Am. Bank v. Agricultural Ins. Co.* 8 Mo. App. 401. 1880.

§ 3. An illegal assessment and seizure of insured property under U. S. Revenue Laws, does not create a lien under terms of a policy of insurance, nor is it a change of possession by legal process. The phrase legal process means *valid* legal process. *Runkle v. Citizens' Ins. Co.* 6 Fed. Rep. 143. 1881. U. S. Circuit, Pa.

## ESTOPPEL.

§ 1. If policy is issued with knowledge and verbal assent of company's agent to a transfer of insured property in trust for creditors, it operates as an estoppel. *McQueen v. Phoenix Mut. Ins. Co.* 4 Can. Sup. 660. 1880.

§ 2. Company is not affected by knowledge of its agent acquired after issue and delivery of the policy. *Crane v. City Ins. Co.* 3 Fed. Rep. 558. 1880. U. S. Circuit, Ohio.

See Reformation, § 2. Title, 2.

## EVIDENCE.

§ 1. Issue being on question of increase of risk and notice to company through its agent as waiver of written consent, witness was asked, "What is your best recollection as to what took place in regard to notice? *Ans.* My impression is that I stated the facts to the agent." *Held,* that testimony was not such as to warrant a jury to set aside condition of contract requiring written consent. Pottsville Mut. Ins. Co. v. Horan, 10 Ins. L.J. 771. 1881. Pa.

See Agent, § 1. Contribution, 1.

## EXECUTION.

See Encumbrance, § 3.

## FOREIGN COMPANY.

§ 1. The Act of the Legislature of Ontario (R. S. O. ch. 162), prescribing conditions of insurance, is not a "regulation of trade and commerce" as these terms are used in the British North America Act. Citizens' Ins. Co. v. Parsons, 4 Can. Sup. 215. 1879.

§ 2. A company which has insured property in Ontario and has not complied with R. S. O. ch. 162, by printing statutory conditions in the policy, cannot avail itself of either its own or the statutory conditions. In such a case the assured only may have benefit of the statute. Citizens' Ins. Co. v. Parsons, 4 Can. Sup. 215. 1879.

§ 3. Section 1, ch. 90, of the General Statutes of Missouri, which gives damages in actions against insurance companies for a vexatious refusal to pay policies, was not repealed by Act of March 10, 1869, for the incorporation and regulation of insurance companies. Relfe v. Wilson, 1 Morrison Tr. 264. 1880. U. S. Sup.

§ 4. While failure by foreign company to comply with statute governing its authority to transact business in the State subjects its agents and brokers to penalties prescribed, such failure does not affect the validity of

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the policies issued, or in any manner operate to prejudice of policy holders. *Erhman v. Teutonia Ins. Co.* 1 Fed. Rep. 471. 1880.

### FRAUD AND FALSE SWEARING.

§ 1. To sustain defense of fraud in swearing to proofs and amount of claim it must be established not only that property was worth less but that assured made a fraudulent valuation. *Putnam v. Commonwealth Ins. Co.* 18 Blatch. 368. 1880.

§ 2. Under condition that "all fraud or attempt at fraud, by false swearing or otherwise, shall render policy void," a mere willfully false statement is not itself sufficient to effect a forfeiture without proof that company was in some way prejudiced thereby. *Shaw v. Scottish Commercial Ins. Co.* 1 Fed. Rep. 761. 1880.

### INCREASE OF RISK.

§ 1. The words "increase the risk" should be construed as meaning an essential and material increase of the risk. *Crane v. City Ins. Co.* 3 Fed. Rep. 558. 1880. U. S. Circuit, Ohio.

§ 2. Policy contained clause as follows: "The insured has permission to make alterations and repairs incidental to the business." Defense was an increase of the risk. Held, that above clause could not be extended to embrace all alterations which parties might desire to make connected with carrying on of the business, although it might increase, to an unlimited extent, liability of premises to be destroyed by fire. Clause must be understood as embracing such alterations in relation to the carrying on of the business of the plaintiffs as would not essentially and materially increase the liability of the property to be destroyed by fire. *Crane v. City Ins. Co.* 3 Fed. Rep. 558. 1880. U. S. Circuit, Ohio.

§ 3. Condition provided that "any change material to the risk, and within knowledge or control of assured, should void policy unless change notified to company in

writing, &c., in which case company might cancel. Premises were insured as "occupied as a grocery store and dwelling," and were re-let to one who used them for dealing in furniture, and had a small room rear of shop in which he had a carpenter's bench and tools and did repairing and rough work. The local agent of company was notified of change, and went on premises and saw work being done in shop. He then wrote to home office of company, advising them of the facts. They replied that if policy was sent with explanation, they would consent in writing, adding "Is there woodwork done on the premises?" Matter was then allowed to drop. The questions of materiality and notice having been submitted to the jury, *Held*, that their verdict in favor of plaintiff was conclusive. *Peck v. Phoenix Mut. Ins. Co.* 45 Up. Can. Q. B. 620. 1881.

§ 4. Policy provided, that "if after insurance the risk shall be increased by any means whatsoever, or if the property be used or occupied so as to render the risk more hazardous than at time of insuring, and the assured shall notify the company of said increased risk, and obtain written consent, \* \* \* \* it shall be void. At time risk was taken there was a vacancy of twenty-six feet on one side of insured property. Subsequently assured erected a new house on this vacant lot, thus filling up opening and forming one continuous row of frame houses. The fire was communicated from the new building. *Held*, that the fact of increase of risk was so self-evident as to require no proof, and that plaintiff was not entitled to recover. *Pottsville Ins. Co. v. Horan*, 10 Ins. L. J. 771. 1881. Pa.

See Waiver, § 5.

#### INSURABLE INTEREST.

§ 1. Party who has transferred to a Bank warehouse receipts as collateral security, retains an insurable interest in the property. *Parsons v. Queen Ins. Co.* 29 Up. Can. C. P. 188. 1878.

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§ 2. A. having made advances to B. upon a vessel in course of construction, upon faith of a verbal agreement that when finished vessel should be put in former's hands for sale and that he should be repaid out of proceeds, and fire occurring before work was completed, *Held*, that A. had an equitable interest and that it was insurable. *Clark v. Scottish Imp. Ins. Co.* 4 Can. Sup. 192. 1879. Rev'd 2 Pugs. and B. 240.

See Pleading and Practice, § 5.

#### INTEREST IN POLICY.

See Mortgagor and Mortgagee, § 3.

#### LIGHTING.

See Storing and Keeping, § 2.

#### LIMITATION CLAUSE.

§ 1. The time prescribed in a policy of insurance during which suit must be brought, does not commence to run until right of action accrues on the policy. *Barber v. F. and M. Ins. Co.* 16 W. Va. 658. 1880.

See Proofs of Loss, § 1.

#### MORTGAGOR AND MORTGAGEE.

§ 1. *Semble.* When policy is issued to a mortgagor, with loss payable to the mortgagee, if the injured property is repaired by the mortgagor there is no right of action on the policy. *Friemansdorf v. Watertown Ins. Co.* 1 Fed. Rep. 68. 1879.

§ 2. Policy issued by misrepresentation as to the ownership of the property cannot fairly be considered as embraced within the meaning of a special mortgage clause which provides that interest of mortgagee shall not be invalidated by any act or neglect of the mortgagor or owner of the property. Such a clause contemplates a case where the owner could act or could neglect, and not a case where policy is issued in name of an infant, or of one who by reason of incapacity could not furnish any protection to

the company. *Graham v. Firemen's Ins. Co.* 13 N. Y. Weekly Dig. 338. 1881. N. Y. Ct. App.

§ 3. When policy is issued in name of owner and loss made payable to mortgagee, with special agreement with latter to effect that any breach of conditions of insurance by owner will not affect the mortgagee; and that in such case if company claims there was such a breach it shall be subrogated to rights of the mortgagee (known as the *mortgagee clause*), it is not an insurance of the *mortgagee interest*. It is an insurance of the *owner's interest* and the policy enures to his benefit at the outset and so continues, *unless some condition in it is broken*. *Doran v. Franklin Fire Ins. Co.* 10 Ins. L. J. 842. 1881. N. Y.

See Who May Sue, § 1, 2.

#### MUTUAL COMPANY.

§ 1. Sect. 41, R. S. O. ch. 161, provides, that "in case any property is alienated by sale, policy shall be void and shall be surrendered to company to be cancelled, and thereupon assured shall be entitled to receive his deposit note upon payment of his proportion of accrued losses." *Held*, that an alienation avoided the policy wholly and operated not only to relieve company from any liability on contract of insurance, but also enabled assured to relieve himself from liability to further assessment. *Niagara Dist. Mut. Ins. Co. v. Godon*, 29 Up. Can. C. P. 611. 1879.

§ 2. In suit for an assessment upon premium note the fact that the assessments largely exceeded liabilities of company will not defeat recovery where it appears that amount company was actually able to collect was a sum less than the liabilities. *Buckley v. Columbia Ins. Co.* 92 Pa. 501. 1880.

§ 3. A promissory note having been given and accepted for an assessment upon a premium note, and former not being paid at maturity, *Held*, that by 36 Vict. ch. 44, O., the note could be deemed only as suspending debt during the time it had to run, and that therefore its non-

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payment at maturity avoided the insurance. *McGugan v. Manufacturers' and Merchants' Ins. Co.* 29 Up. Can. C. P. 494. 1879. But see *Ballagh v. Royal Mut. Fire Ins. Co.* 5 Tupper, 87. 1880.

§ 4. In levying an assessment directors need not make a separate assessment on each member by name, or levy an ascertained sum on each member; a general assessment on all the members for a given percentage upon their notes is sufficient. *Lycoming Fire Ins. Co. v. Rought*, 12 Rep. 666. 1881. Pa. s. c. 10 Ins. L. J. 786.

§ 5. Assured holding policy of mutual company notified agent that he had obtained other insurance, and latter stated that insurance was all right. Subsequently a dividend was paid to assured. *Held*, that company was bound by notice to and knowledge of agent, and payment of the dividend operated as a waiver. *Combs v. Shrewsbury Ins. Co.* 7 Stewart (N. J. Eq.), 403. 1881.

#### NOTICE OF LOSS.

§ 1. When policy does not require notice of loss to be in writing, or the information conveyed in any special or formal manner, a notice given by a messenger verbally to the insuring agent and by him communicated to the company is both in time and form sufficient. *Argall v. Ins. Co.* 84 N. C. 355. 1881.

#### OTHER INSURANCE.

§ 1. A consent to existing other insurance does not prevent assured from changing companies so long as he does not increase the total amount. *Parsons v. Victoria Mut. Ins. Co.* 29 Up. Can. C. P. 22. 1878.

§ 2. Policy in suit was upon a stock of wool, purchased during the wool season, and kept in a certain storehouse separate from assured's general stock. A prior policy of another company was on general stock of goods, including some wool pickings, but a small quantity purchased out of the season. *Held*, latter policy not to be

other insurance. *Parsons v. Queen Ins. Co.* 29 Up. Can. C. P. 188. 1878.

§ 3. Issue by agent of company of a policy with knowledge of existence of other insurance, operates as a waiver of condition requiring written consent. *Putnam v. Commonwealth Ins. Co.* 18 Blatch. 368. 1880.

§ 4. Trial court overruled defense based on existence of prior insurance, on the ground that the prior policy had become void in consequence of vacancy and increase of risk, and consequently that there was no prior insurance when defendant's policy was issued. *Held*, error; that prior policy was valid when issued, but was avoidable by company issuing it for breach of condition subsequent. The first policy was voidable only at election of the company. Violation of the conditions did not, *ipso facto*, extinguish the policy. *Landers v. Watertown Fire Ins. Co.* 10 Ins. L. J. 862. 1881. N. Y.

§ 5. Defendant's policy contained condition providing that if assured should have or procure other insurance it should be void. And also another condition providing for an apportionment of the loss in event of existence of other insurance. Policy, claimed to be other insurance, was obtained by a mortgagee (to whom the loss was made payable), without the knowledge of the plaintiff. The mortgage contained clause authorizing insurance by mortgagee if plaintiff's covenant to keep property insured was not kept. Proofs of loss furnished to the other company were executed by plaintiff. *Held*, that plaintiff's covenant in mortgage to insure was not broken until there was default on his part, and he could be put in default only by refusal or neglect to procure the insurance after some sort of notice or demand. There was no ratification by him of the insurance obtained by the mortgagee so as to make the procuring of it his act. That the act of the mortgagee cannot be so far regarded as the act of Doran as to violate clause in the policy. It was not other insurance, procured by him within the meaning of the first condition. But *Held*, that the loss should have been apportioned under the other condition, and that refusal of trial court to so charge was error. *Doran v. Franklin Fire Ins. Co.* 10 Ins. L. J. 842. 1881. N. Y.

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## OVERVALUATION.

§ 1. Overvaluation to render insurance void must not only be extravagant, but must have been intentionally made in bad faith. The question is proper to be determined by a jury, and their verdict is conclusive. *Miller v. Alliance Ins. Co.* 7 Fed. Rep. 649. U. S. Circuit, N. Y.

§ 2. Condition provided that if assured should insure his property, or cause the same to be described otherwise than as it really exists, to prejudice of company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company in order to enable them to judge of the risk they undertake, such insurance shall be of no force in respect of property in regard to which the misrepresentation or omission is made. In application assured stated value to be \$900, and obtained insurance for \$600. Jury found that actual cash value was \$450, but that assured's representation was made in good faith, and that he had not been guilty of any fraud. *Held*, that the question of value was a material fact, and the representation being untrue, policy was thereby rendered void. That it was immaterial whether such representation was in good faith or fraudulently made. *Sly v. Ottawa Agricultural Ins. Co.* 29 Up. Can. C. P. 557. 1879. See s. c. 29 Up. Can. C. P. 28.

## PAROL CONTRACT.

§ 1. Plaintiff, a merchant, discounted paper with his bankers on security of warehouse receipts, and at same time signed an application for insurance upon the property, to be held by the bank as additional security. The bank's agent was also agent of the defendant. The agent either charged plaintiff with premium or received it in cash, but did not then fill up and sign any interim receipt or any other written contract, stating he was too busy to do so. Home office of defendant was advised of the insurance, but not of the mode of effecting it, and after the loss agent filled up and delivered an interim receipt.

There was no evidence of any express authority to the agent to enter into verbal contracts, while application stated that insurance was on usual terms and conditions of the company. One of these conditions was that no receipt or acknowledgment of insurance should be binding unless made by and on one of defendant's printed forms, and signed by their authorized agent. *Held*, that the question of liability must be tested or considered as it stood at time of fire, and that there was no sufficient contract of insurance. *Parsons v. Queen Ins. Co.* 29 Up. Can. C. P. 188. 1878.

§ 2. When by conversation of applicant with agent, the mutual understanding is that future insurance is to be made in usual way by force of written policies, and the choice of companies and management of details are left to the agent, a promise by him "to keep applicant insured" is inoperative to effect a sufficient parol contract of insurance. *Sargent v. National Fire Ins. Co.* 10 Ins. L. J. 852. 1881. N. Y.

§ 3. The extent of agent's authority was permission granted to him by company to solicit and receive applications for insurance, which were to be presented by him to the company for consideration, and if accepted he would be entitled to a certain commission. An application was signed and delivered to this agent, who stated to applicant, on receiving it, that "risk attached from noon of that day." Application was not presented to company until next day, but during the meantime property was destroyed by fire. The application was rejected, and applicant brought suit and sought to maintain it on a parol contract with the agent. *Held*, that agent had no authority to bind the company by contract. To convert a proposition into a contract, it is not sufficient to show strong probability that it would have been accepted; acceptance, actual, final and irrevocable, must be proved. *Stockton v. Firemen's Ins. Co.* 10 Ins. L. J. 834. 1881. La.

## PREMIUM.

§ 1. A condition which provides that no insurance shall be considered to be binding until actual payment of the premium, is not governed by the statute relating to conditions of insurance or variations. That Act relates to contracts of insurance which have been made. The above condition refers to a precedent act to be done, without which there is to be no contract. *Geraldi v. Provincial Ins. Co.* 29 Up. Can. C. P. 321. 1878.

## PROOFS OF LOSS.

§ 1. Denial of all liability waives proofs of loss, and also clause limiting time in which suit must be brought. It is a well settled principle of the law of contracts, as applicable to contracts of insurance as to any other class of contracts, that if one party to a contract gives notice that he will not perform his part, such refusal is of itself a breach of the contract, and the other party in suing upon it need not allege performance or readiness to perform conditions which he would have otherwise been required to perform, or offer to perform, before commencing suit. *Home Ins. Co. v. Gaddis*, 10 Ins. L. J. 774. 1878. Ky.

§ 2. When condition of insurance requires statement of loss to be sworn to by assured, his failure to make such oath renders statement defective in a material respect. *Spooner v. Vermont Mut. Ins. Co.* 12 Rep. 764. 1881. Vt. s. c. 10 Ins. L. J. 737.

§ 3. Defects in proofs of loss must be specifically pointed out; otherwise they are waived. *Argall v. Ins. Co.* 84 N. C. 355. 1881.

§ 4. When assured has made an honest mistake in his proofs of loss as to a material fact, he may on the trial give evidence to correct it, where it will not operate as a surprise to the company. The mistake in this case related to cause and origin of fire. *Waldeck v. Springfield F. and M. Ins. Co.* 12 Rep. 768. 1881. Wis. s. c. 10 Ins. L. J. 930.

§ 5. The effect of failure to object to proofs of loss as a waiver cannot be obviated or removed by fact that defects were not known at time. It is the duty of company or its agent to ascertain whether proofs furnished comply with condition. *Miller v. Alliance Ins. Co.* 7 Fed. Rep. 649. 1881. U. S. Circuit, N. Y.

§ 6. Assured, having been misled by acts and declarations of company's adjuster, is excused from furnishing proofs of loss within the thirty days as prescribed by policy in suit. This may be so held on the ground of "mistake" under Insurance Policy Act, R. S. O. ch. 162. *Robbins v. Victoria Mutual Ins. Co.* 31 Up. Can. C. P. 562. 1881.

§ 7. Policy required that proofs of loss should be made and forwarded to company as soon as possible after the happening of the fire by which loss occurred. The fact was that proofs thus required were not furnished until nearly three months after the fire. There was some evidence explanatory of the delay. *Held*, that without such evidence lapse of three months would be too late, but that with it, the question as one of reasonable time was proper to be submitted to and determined by the jury. *Home Ins. Co. v. Davis*, 10 Ins. L. J. 754. 1881. Pa.

See Waiver, § 4.

#### PLEADING AND PRACTICE.

§ 1. Report of referee as to facts is, like verdict of a jury, conclusive in a case of conflict of evidence, and is, like such verdict, to be set aside only when the finding of fact is clearly against the weight of evidence. *Putnam v. Commonwealth Ins. Co.* 18 Blatch. 368. 1880.

§ 2. Where terms of policy are set out in declaration, specific performance of all conditions precedent must be averred, otherwise demurrable. *Perry v. Phoenix Ins. Co.* 24 Alb. L. J. 519. 1881. U. S. Circuit.

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§ 4. Form of case agreed upon for submission to Court—a case stated for the opinion of the Court in the nature of a special verdict. *Hagaman v. Allemania Ins. Co.* 10 Ins. L. J. 838. 1881. Pa.

§ 5. Complaint should not only aver an insurable interest at time of issue of policy, but also at time of loss. *Home Ins. Co. v. Duke*, 10 Ins. L. J. 857. 1881. Ind.

#### QUESTIONS FOR COURT AND JURY.

See Overvaluation, § 1; Proofs of Loss, 7.

#### REFORMATION.

§ 1. To warrant reformation of policy mistake must be mutual, and the facts necessary to prove such mistake must be established by clearest and plainest evidence. *Farmer's Ins. Co. v. Butler*, 24 Alb. L. J. 399. 1881. Md.

§ 2. When agent of company intrusted with power to make and issue policies, and the assured fully and frankly discloses all facts material to the risk, and the agent in making out the policy, through fraud or mistake, fails to state such facts, such error or fraud cannot be relied upon as a defense, and a court of equity will reform the policy so as to make it express the real contract between the parties. *Ben Franklin Ins. Co. v. Gillett*, 24 Alb. L. J. 518. 1881. Md.

#### REMOVAL CAUSES TO UNITED STATES COURT.

§ 1. A uniform rule to be drawn from the various decisions upon question of right of removal to U. S. Circuit Court under Act of Congress, 1875, is about as follows in substance: The latest term at which a cause can be removed is at the first term when it is at issue on its merits, or

should be at issue but for the fault of the petitioner. Whether the business of the Court will admit of the case being then tried, or the parties are otherwise ready, are not material inquiries. If the issue is not made up until after the term fixed by the law of procedure of the State as the trial term, the cause cannot be removed. Wheeler v. Liv., L. and G. Ins. Co. 10 Ins. L. J. 794. 1881. N. H.

#### RENEWAL.

§ 1. Renewal by company or its agent with knowledge of forfeiture, waives it. Law v. Hand-in-Hand Ins. Co. 29 Up. Can. C. P. 1. 1878. Shafer v. Phoenix Ins. Co. 12 Rep. 736. 1881. Wis.

See Warranty and Representation, § 2.

#### REPAIRS.

See Increase of Risk, § 2.

#### RISK.

§ 1. Policy insured certain household furniture described as "all contained in house — McMillan St, Providence, R. I." At time of fire furniture had been removed and was in another house. Defendant was not informed of the removal. Plaintiff nonsuited on ground that contract was that goods should remain in or be in house on McMillan Street. *Held*, that there was no warranty in description as to location, and that liability of company was not limited to a loss in the particular house described. To thus limit liability company should have expressly prohibited removal without consent. Lyons v. Providence Ins. Co. 10 Ins. L. J. 733. 1881. R. I.

#### STORING AND KEEPING.

§ 1. During occupation of store by assured he used kerosene and naphtha for purpose of lighting the same, using naphtha for the first week he was there, and kerosene for remainder of the time. During same period naphtha was also used in the store by a stranger, to ex-

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hibit a stove of which he had the agency. There was no naphtha on premises at time of fire, nor any kerosene, except a small quantity used for purpose of filling lamps in store. Kerosene was permitted for lights. Condition provided that "if in said premises there be *kept* \* \* \* petroleum, naphtha, gasoline, benzine \* \* \* or there be *kept or used* therein, camphene, spirit gas, or any *burning fluid*, or any chemical oils, policy should be void. *Held*, that the naphtha was not *kept* within meaning of condition; that the term meant keeping as objects of merchandise or manufacture. That the naphtha could not be deemed to be a *burning fluid* under last clause of condition; being specifically named in first part, it could not be so assumed without evidence that it was so known. That the clause against keeping or using should be construed as affecting the policy only so long as the articles are kept or used. Putnam v. Commonwealth Ins. Co. 18 Blatchf. 368. 1880.

§ 2. Policy contained condition that, if \* \* \* "petroleum, fluid, or crude earth or coal oils \* \* \* should be used or kept, it should be void, except kerosene oil may be used for lights in dwellings." Property insured was a factory. There was no permission in policy to use any kind of oil. At time of fire there were used for lights two ordinary lanterns filled with "headlight oil." *Held*, that headlight oil being a refined petroleum product, was within the condition, and its use constituted a breach. Couch v. Rochester German Ins. Co. 13 N. Y. Week. Dig. 254. 1881. N. Y. Sup.

§ 3. Issue by company with knowledge of use of prohibited article, operates as a waiver of the condition, and if such knowledge is possessed at time of issue of policy, it is immaterial how or when acquired. Couch v. Rochester German Ins. Co. 13 N. Y. Weekly Dig. 254. 1881. N. Y. Sup.

#### SUBROGATION.

See Who May Sue, § 8.

## TITLE.

§ 1. Clause in policy making loss payable to a third party is notice to company of such party having some interest. *Parson v. Queen Ins. Co.* 29 Up. Can. 188, 210. 1878.

§ 2. Application contained following: "Q. State nature of your title; whether fee simple, &c. If others are interested, give name, interest and value? *Ans.* Owner. Q. What incumbrance, if any, is now on the property? *Ans.* \$60, balance of payment, to be paid in four years." It appeared that assured had purchased the land from a minor for \$60, to be paid for and deed to be delivered in four years, when minor became of age; that house was so built as to be capable of removal. All these facts were known to company's agent when policy issued. *Held*, that defense of fraudulent representation was not sustainable. *Brogan v. Manufacturers' & Merchants' Fire Ins. Co.* 29 Up. Can. C. P. 414. 1878.

§ 3. *Semble*, that when insurance is obtained upon a written application, although assured may have therein agreed to be bound by conditions of policy, the condition requiring statement of interest when not sole and unconditional ownership, is inoperative when assured was not questioned in regard to title, &c., in the application. *O'Neill v. Ottawa Agricultural Ins. Co.* 30 Up. Can. C. P. 151. 1879.

§ 4. A representation that assured "owns land in fee simple," is not rendered untrue by the fact that price has not been paid, he holding a deed. *O'Neill v. Ottawa Agricultural Ins. Co.* 30 Up. Can. C. P. 151. 1879.

§ 5. Assured was in possession of certain furniture under a contract of purchase, with condition that title was not to pass until price was paid. Loss was made payable to vendor as interest might appear. Policy contained clause that if the interest of assured, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee or otherwise, be not truly stated, it should be void. Assured represented property as hers. *Held*, that insurance was void.

That while assured had an insurable interest, it was not truly stated as required. That the clause making loss payable to vendor was not equivalent to notice that he owned the furniture. At most it implied that he had some lien or some interest in the furniture which was consistent with title and ownership in assured. *Lasher v. St. Joseph F. & M. Ins. Co.* 13 N. Y. Weekly Dig. 146. 1881. N. Y. Ct. App. s. c. 10 Ins. L. J. 845.

§ 6. Policy provided that "if the interest of the assured be any other than the entire, unconditional, and sole ownership, for use and benefit of assured, \* \* \* it must be so represented and expressed in policy, otherwise it should be void. Defendant offered to prove that grantors of plaintiff's grantor were only entitled to an easement in the property. Evidence was excluded. *Held*, no error; that offer was only in substance to prove a defective title. The condition in question refers to extent of the insurable interest of plaintiff, and not to validity of his title. So long as he had, under claim of right, exclusive use and enjoyment of the insured property, without any assertion of an adverse right or interest in it by any other person, he was the owner of the property. *Miller v. Alliance Ins. Co.* 7 Fed. Rep. 649. 1881. U. S. Circuit, N. Y.

See Mortgagor and Mortgagee, § 2. Waiver, 6.

#### USE AND OCCUPATION.

See Increase of Risk, § 3. Warranty and Representation, 3.

#### VACANT OR UNOCCUPIED.

§ 1. Condition provided that "this policy shall not cover unoccupied buildings unless insured as such, and if premises insured shall be vacated without consent indorsed \* \* \* insurance should be void. Assured having left premises for temporary purpose of attending funeral of a friend, *Held*, that there was no breach of the conditions. *Franklin Fire Ins. Co. v. Kepler*, 10 Ins. L. J. 784. 1880. Pa.

## WAIVER.

§ 1. The fact that a statute makes policy void in certain events, does not prevent a revival thereof by acts recognizing its continued existence, and dealing with assured, and allowing him to pay money or alter his position on the assumption that he is still insured. *Law v. Hand-in-Hand Ins. Co.* 29 Up. Can. C. P. 1. 1878.

§ 2. Policy having been assigned before a loss without written consent, as required by its terms, but with verbal assent of the agent, *Held*, that validity of contract must be determined by law and not by stipulation between the parties; and although parties may agree that a contract which they have voluntarily reduced to writing shall not be altered or modified unless the agreement for such alteration or modification be evidenced by writing, yet a subsequent agreement by parol to alter or modify will be as valid if no stipulation had been in the original contract, and it follows that having consented by parol to the transfer, defendant is as much bound as if its consent was in writing. *Home Ins. Co. v. Gaddis*, 10 Ins. L. J. 774. 1878. Ky. *Contra*, *Walsh v. Hartford Ins. Co.* § 23, page 346.

§ 3. There is no waiver of objections to a certificate by retaining it sixteen days after its receipt before making the objection, assured having an opportunity to correct or amend the defect. *Gilligan v. Commercial Ins. Co.* 20 Hun, 93. 1880. Aff'd by N. Y. Ct. App. (without opinion) 24 Alb. L. J. 480.

§ 4. Where a written agreement for appraisal states expressly that it is to determine amount of loss only, and that it is made without reference to other questions or matters of difference, the submission cannot be construed as a waiver of defects in proofs of loss. *Gilligan v. Commercial Ins. Co.* 20 Hun, 93. 1880. Aff'd by N. Y. Ct. App. (without opinion) 24 Alb. L. J. 480.

§ 5. Policy requiring consent in writing to an increase of risk notice to agent does not operate as a waiver

of such a condition. *Pottsville Mut. Ins. Co. v. Horan*, 10 Ins. L. J. 771. 1881.

§ 6. If assured correctly states his interest in property at time he obtains the insurance, it operates as a waiver of the condition requiring it to be stated in policy of any other or less than absolute ownership. *Bredow v. Erie Co. Mut. Ins. Co.* 13 N. Y. Weekly Dig. 211. 1881. N. Y. Sup.

See Encumbrance, § 2. Evidence, 1. Mutual Company, 5. Other Insurance, 3. Proofs of Loss, 1, 3, 5, 6. Renewal, 1. Storing and Keeping, 3. Title, 3.

## WARRANTY AND REPRESENTATION.

§ 1. Policy contained condition that if applicant should make an erroneous or untrue representation or statement in application or diagram, or omit to make known any fact material to the risk, policy should be null and void. Company set up breach of warranty in stating that there were no buildings within one hundred feet of insured property other than those mentioned in application, survey, and diagram, whereas there were other buildings. Application contained a number of questions, none of which referred to existence of buildings within one hundred feet. Below questions was a square space headed "Diagram," with a note at side, "Give all exposures within one hundred feet, and mark distances between buildings." At foot of application "it is hereby expressly agreed and warranted that each and every of the answers as above made is true, and that the same and this application, survey and diagram shall be part of the insurance contract and policy, and that the foregoing is a full, just, and true exposition of all facts and circumstances, condition, situation and value of property to be insured, so far as the same are material to the risk." Held, that warranty set up was not established. That application showed that only warranty was as to the answers to questions none of which related to distance of buildings; and that assured was bound only to make known such

buildings as were material to the risk. *Wilson v. Standard Ins. Co.* 29 Up. Can. C. P. 308. 1878.

§ 2. Although by statute when an indorsement is made upon a policy, it does not become a part thereof as a warranty, it becomes so on renewal authorized by the same statute. *Gauthier v. Canadian Mut. Ins. Co.* 29 Up. Can. C. P. 593. 1878.

§ 3. Property was insured as a tenement dwelling. By an indorsement, subsequently made, building was allowed "to be occupied as a refreshment room—no liquor sold." Building was occupied by a tenant, and liquor was sold by him, but without knowledge or consent of assured. *Held*, that indorsement created a warranty, and that there was a breach avoiding the insurance. *Gauthier v. Mutual Ins. Co.* 29 Up. Can. C. P. 593. 1879.

§ 4. Assured stated in application that there was only one stove in the insured premises, when in fact there were two. *Held*, an untrue statement, avoiding the insurance. *O'Neill v. Ottawa Agricultural Ins. Co.* 30 Up. Can. C. P. 151. 1879.

§ 5. Policy referred to application and survey as part of it. Back of application was headed diagram, with directions as to filling up. There were two buildings, one 18x20, and another smaller one within the prescribed distance, omitted from the diagram. *Sembla*, the diagram was part of application within meaning of condition making statements in application warranties; that the omission of the two buildings constituted a breach of warranty; but that a statement of distance between buildings as 190 feet instead of 178 feet was so slight as to be immaterial. *O'Neill v. Ottawa Agricultural Ins. Co.* 30 Up. Can. C. P. 151. 1879.

§ 6. Application contained following: "*Q.* Is there reason to fear incendiarism, or has any threat been made? *Ans.* No." It appeared from the evidence that about a week before application was made for the insurance, that a servant of assured had threatened to beat him, and latter being a nervous and timid man, being alarmed, ob-

tained the insurance; that he had set up and watched for a night, and that he believed premises were set on fire. *Held*, that plaintiff was not entitled to recover; that having admitted his own belief in the danger and acted upon it, his answer to the question in the application was untrue. *Campbell v. Victoria Mut. Fire Ins. Co.* 45 Up. Can. Q. B. 412. 1880.

§ 7. Condition provided that "company would not dispute the correctness of any diagram or plan prepared by its agent from a personal inspection." Application required assured to state all buildings within one hundred feet of insured building, and assured omitted to state existence of a small building used for storing coal oil within that distance. A diagram was made and filled in by agent and signed by him in his own name as well as that of assured, but no reference was made to this building. Diagram was not made from a personal inspection at the time, but from a previous inspection and knowledge thereby acquired. *Held*, that even if assured under above conditions would be relieved from effect to make known the building in question, when there was a personal inspection by the agent, there was none in this case, as condition required it to be one made for the purpose of this particular insurance. *Quinlan v. Union Fire Ins. Co.* 31 Up. Can. C. P. 618. 1881.

§ 8. Property was insured as a frame building situated on west side of Liberty street in village of Fairhaven, Vermont, as per diagram No. 134,767 on file in this office. Policy provided that any plan, survey, or description, of property, referred to should be considered as a part of it. The diagram referred to was a map or plan in which property insured was laid down as being on one side of Liberty street, with a dwelling-house on one side, about thirty feet distant, a hotel barn on the other side about fifty feet distant, and hotel on same side, distance not indicated. There was a barn or stable at that time standing nineteen feet from the insured property, which was not represented in the diagram. The distance between the hotel barn and insured property was actually  $36\frac{1}{2}$  feet as found by the referee, instead of 50 feet as stated in dia-

gram. *Held*, that there was a breach of warranty in respect to the diagram, and that plaintiff could not recover. *Gilligan v. Commercial Ins. Co.* 20 Hun, 93. 1880. Aff'd by N. Y. Ct. of App. (without opinion) 24 Alb. L. J. 480.

§ 9. If by terms of policy misrepresentations are converted into warranties by stipulation, an untrue answer will avoid the policy, without reference to materiality, *Graham v. Firemen's Ins. Co.* 13 N. Y. Weekly Dig. 338. 1881. N. Y. Ct. App.

See Risk, § 1.

#### WHO MAY SUE.

§ 1. When policy is issued to a mortgagor with the loss payable to the mortgagee, suit must be instituted in name of former, and cannot be instituted in name of party to whom loss is made specifically payable. The contract is with the mortgagor, and any violation by *him* of its conditions voids the insurance. *Friemansdorf v. Watertown Ins. Co.* 1 Fed. Rep. 68. 1879.

§ 2. The provision in policy making loss payable to a third party operates to enable company in fulfillment of that covenant to pay party named, and set up such payment in an action by assured. But if loss is not so paid, a breach of the covenant with assured is committed and he is the person in whom the right of action for such breach is vested; he is the proper person to sue. *McQueen v. Phoenix Mut. Fire Ins. Co.* 4 Can. Sup. 660. 1880.

§ 3. Several insurance companies upon payment of a loss, caused by negligence of a third party, become subrogated *pro tanto* to claim of assured against wrongdoer. Where common law procedure prevails action of insurance companies would necessarily be brought in name of the insured. But under Code of Practice (Wis.) companies must be joined with assured as plaintiff, unless made defendant, on account of refusal. *Pratt v. Radford*, 52 Wis. 114. 1881.

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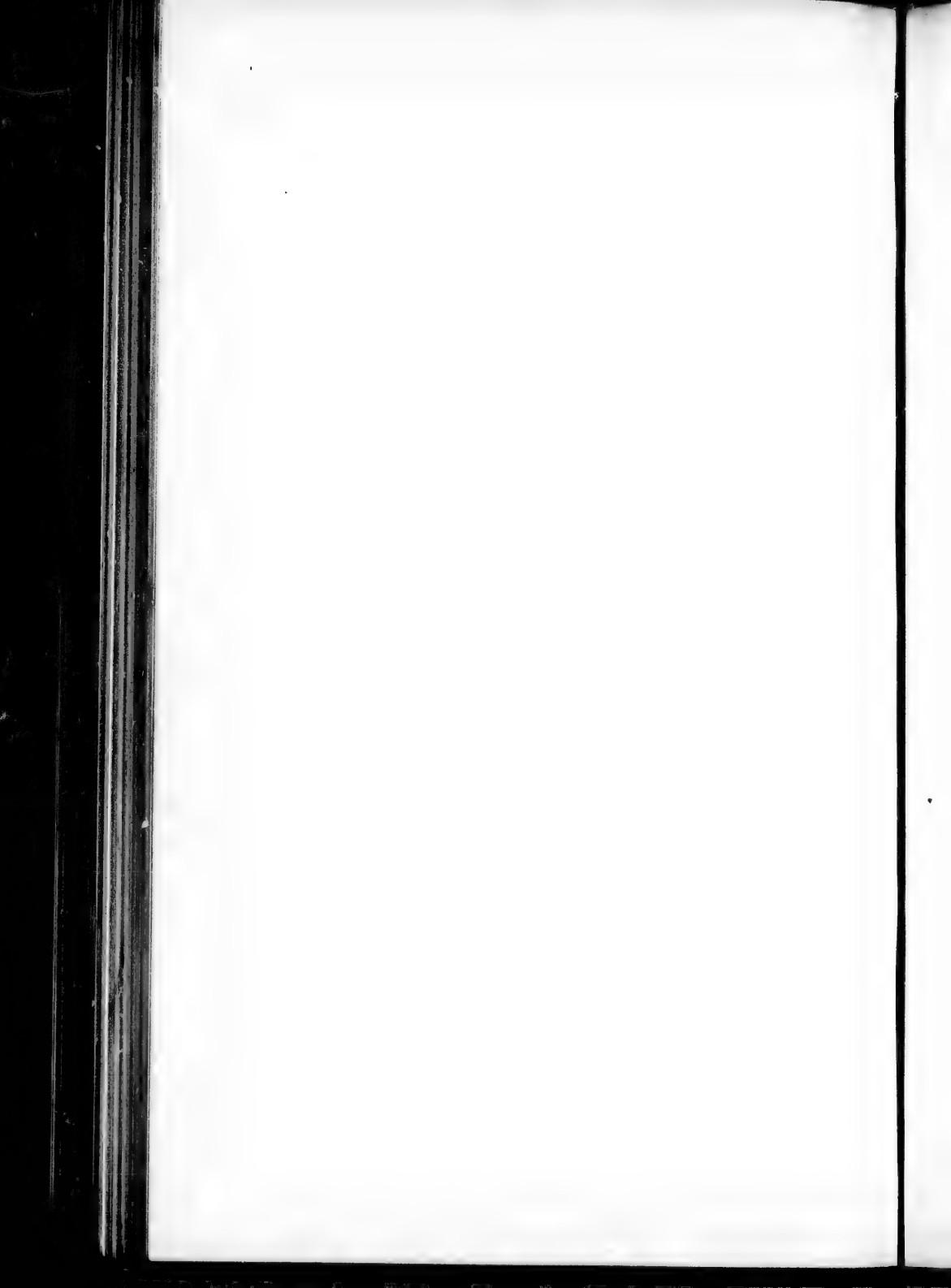
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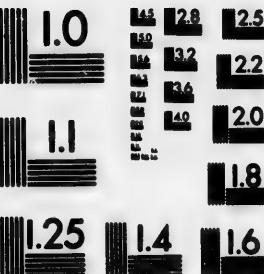
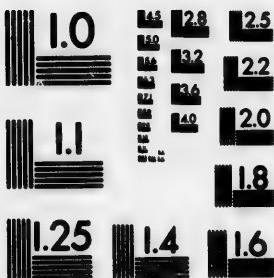
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**IMAGE EVALUATION  
TEST TARGET (MT-3)**



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**Photographic  
Sciences  
Corporation**

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23 22  
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oil

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from fire

orized or